TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 31

JOSE RIVERA SOLER & CO., INC., PETITIONER,

vs.

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1936.

CERTIORARI GRANTED MAY 25, 1936.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from D. C. U. S., District of Puerto Rico	1	1
Second amended complaint	1	1
Answer	5	4
Journal entries. Hearing	11	9
Verdict	13	12
Defendant's motion for directed verdict	14	12
Plaintiff's requests for instructions to jury	15	14
Defendant's requests for instructions to jury	20	19
Additional instructions requested by defendant	24	22
Verdict	24	23
Judgment	24	23
Petition for appeal filed and allowed	25	24
Bond filed and citation issued	25	24
Assignment of errors	26	24
Extensions of time, etc.	28	27
Bill of exceptions	31	30

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—8009-C

	Original	Print
Record from D. C. U. S., District of Puerto Rico—Continued.		
Bill of exceptions—Continued.		
Testimony of Rafael Wolf	32	30
Juan I. Gorbea	36	35
Rafael Wolf (recalled)	46	44
F. A. C. Hastrup	72	71
Rafael Wolf (recalled)	80	79
F. A. C. Hastrup (recalled)	85	84
Juan I. Gorbea (recalled)	86	85
Manuel J. Wys	88	86
Jose Rivera Soler	97	96
Adolph Steffens	102	101
Jose Rivera Soler (recalled)	105	104
Jose L. Berrios Berdecia	119	117
Simon Rojas Negron	123	121
Sebastian Solo	127	126
Teodoro Rodriguez	129	128
Manuel Pumerada	131	130
Jacinto Villaseda	140	138
Antonio Catinchi	144	142
Emilia Rivera	150	148
Ceferina Gonzalez	151	149
Providencia Gonzalez	153	151
Antonio Gonzalez	155	153
Augusto Nazario	164	162
Jose Manuel Canals	166	164
Ludwig L. Lindstrom	167	166
Juan Fernandez	172	170
Jose Manuel Canals (recalled)	174	172
F. A. C. Hastrup (recalled)	177	176
Jose Antonio Ezequiel Rodriguez	185	183
William Arthur Waymouth	190	188
Rafael Wolf (recalled)	222	219
William Arthur Waymouth (recalled)	223	220
Aristides Simonpietri	237	233
Jose Rivera Soler (recalled)	238	235
Luis E. Garcia	241	237
Clemente Ruiz Nazairo	242	239
Plaintiffs' Exhibits 1-10, memo re	243	240
Plaintiffs' Exhibit 11—Insurance policy	243	240
12—Nine ledger sheets, memo. re	258	251
13a, 13b, 13c, 13d, 13e and 13f—Six box files of vouchers, memo re	258	251
14—Twenty-four sheets of stock accounts, etc., memo. re	254	251
15—Book of Account memo. re.	254	251
16—Claim for indemnity	254	252
17—Declaration of insured	259	256
18—Letter, April 5, 1932, Berrios Berdecia to Hastrup	264	260
19—Letter, April 7, 1932, Hastrup to Berrios Berdecia.	264	260

	Original	Print
Record from D. C. U. S., District of Puerto Rico—Continued.		
Bill of exceptions—Continued.		
Plaintiff's Exhibits—Continued.		
20—Letter, April 8, 1932, Berrios Berdecia to Hastrup....	265	261
21—Letter, April 9, 1932, Hastrup to Berrios Bedecia .	266	262
22—Letter, April 12, 1932, Berrios Berdecia to Hastrop.	267	263
23—Letter, May 27, 1932, Hastrup to Berrios Berdecia	268	264
24—Letter, June 1, 1932, Berrios Berdecia to Hastrup....	269	265
25—Letter, June 9, 1932, Hastrup to Berrios Berdecia.	269	265
26—Letter, June 11, 1932, Berrios Berdecia to Hastrup	270	266
27—Letter, June 13, 1932,—Hastrup to Berrios Berdecia.	270	266
28—Letter, June 15, 1932, Berrios Berdecia to Hastrup	271	267
29—Letter, June 20, 1932, Hastrup to Berrios Berdecia.	273	269
30—Letter, July 6, 1932, Berrios Berdecia to Hastrup	274	270
31—Certificate of M. Romany, District Attorney	276	272
32—Sworn statement of Manuel J. Wys	277	273
33—Letter, July 8, 1932, Hastrup to Berrios Berdecia	278	274
34—Same	279	275
35—Letter, July 22, 1932, Travieso to Hastrup.....	279	276
36—Letter, July 23, 1932, Hastrup to Travieso	281	277
37—Letter, April 22, 1932, Hastrup to Berrios Berdecia..	281	278
38—Fifteen ledger sheets—Banco Comercial memo. re.....	282	278
39a and 39b—Plans, memo. re..	282	278
40—Statement of machinery, etc.	282	279
41 and 42—Memo. re.....	284	280
Defendant's Exhibit 1—Deed—Purchase, sale and assignment, April 18, 1931	284	280
2—Inventory of machines and motors	287	284
3, 4—Three books of account, memo. re 291		287
5 to 11, inclusive—Seven photographs, memo. re....	291	287

	Original	Print
Record from D. C. U. S., District of Puerto Rico—Continued.		
Bill of exceptions—Continued.		
Defendant's Exhibits—Continued.		
12—Agreement, March 17, 1932	292	287
13—Schedule of property for 1932-33 filed in Department of Finance	292	288
14—Comparative statement of stock on hand, etc.	295	290
15—General Inventory, December 31, 1931	296	291
16—Letter, March 18, 1932, Soler & Co. to Handcraft Import Co.	300	294
Charge to jury	300	294
Certificate approving bill of exceptions	317	310
Motion for forwarding original exhibits to Appellate Court	317	311
Order for transmission of original exhibits	319	312
Precipe	320	313
Certificate of clerk (omitted in printing)	321	
Enlargement of time for docketing case	322	315
Proceedings in U. S. C. C. A., First Circuit	323	315
Opinion, Morton, J.	323	315
Petition for rehearing	329	319
Opinion, Bingham, J., on petition for rehearing	343	332
Dissenting opinion, Morton, J., on petition for rehearing	348	337
Judgment	352	340
Minute entries of order granting rehearing, etc.	352	340
Order vacating judgment	352	341
Clerk's certificate (omitted in printing)	353	
Order extending time to apply for certiorari	354	341
Order allowing certiorari	355	342

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR PUERTO RICO

No. 2209. Law

JOSE RIVERA SOLER & Co., INC., Plaintiff,

v.

UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA, Defendant

Action on Policy of Fire Insurance

SECOND AMENDED COMPLAINT—Filed May 20, 1933

Comes now the plaintiff above named, by its undersigned attorney, and brings this its complaint against the above named defendant and for a cause of action alleges:

First. That the plaintiff, Jose Rivera Soler & Co. Inc., is a corporation duly organized and existing under and by virtue of the laws of the Island of Puerto Rico, having its principal office and factory in the City of San Juan, Puerto [fol. 2] Rico, where it has been engaged since its organization in the business of buying, selling, handling and dealing in cloth, textiles and dry goods and in the manufacture of conversion thereof, by hand labor and/or by machine into finished products, on its own account or as broker, agent or representative of other persons, firms or corporations; and that the defendant, United Firemen's Insurance Company of Philadelphia, is, as the plaintiff is informed and believes, a stock company duly organized and existing under and by virtue of the laws of the State of Pennsylvania, one of the states of the United States of America, having its principal office in the City of Philadelphia in said State of Pennsylvania, and being duly authorized to do business in the Island of Puerto Rico.

Second. That on or about the ninth day of February, 1932, upon the application of the plaintiff, the defendant insurance company, through its duly authorized General Agents in Puerto Rico Messrs. M. Y. Saldana & Co., Limited, and in consideration of the payment by Jose Rivera

Soler & Co. Inc., plaintiff herein, of the sum of three hundred and fifty-six dollars and thirty-five cents ($356.35), which sum was duly paid to and received by said defendant company, issued and delivered to the plaintiff herein its certain contract or policy of fire insurance in writing, numbered 13380, by the terms of which policy the defendant insurance company insured, for the period of one year from and after the date of the policy, against loss or damage caused by fire or by lightning, the goods and property of the plaintiff corporation; the description of the property insured, the location thereof and the amounts covered by the said policy of insurance being as follows:

"Thirty Thousand Dollars": For the term of one year, distributed as follows:

$15,000.00 On stock of merchandise, unembroidered, embroidered, and in the process of being embroidered, or for repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing and repairing the same, including boxes, samples and packages, the property of
[fol. 3] the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered all while contained in the two story concrete building with zinc roof, situated at Pumerada St. No. 4, block No. 657 of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00 On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments, and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$3,000.00 On furniture, fixtures including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00 Total.

Boundaries

North: Dwelling house of timber construction with iron roof.

South Pumarada St.

East: Yard.

West: Yard and dwelling house of timber construction with iron roof.

A copy of said policy of fire insurance, number 13380, is hereto annexed and made a part hereof, being marked "Plaintiff's Exhibit A".

Third. That early in the morning of the thirteenth day of March, 1932, and while said policy of insurance was in full force and effect, a fire occurred in the factory of the plaintiff corporation, located at number 4 Pumarada Street, block number 657 of the suburb of Santurce, San Juan, Puerto Rico, and said fire destroyed all the machinery and all the merchandise and property installed and stored in said factory. A true and exact statement of the nature [fol. 4] and of the value of the property covered by said policy of fire insurance number 13380, which was stored in the said factory at the time of the fire and which was totally destroyed by the said fire of March 13, 1932, is hereto annexed and made a part of this complaint, being marked "Plaintiff's Exhibit B".

The plaintiff further alleges that at the time of the occurrence of the said fire of March 13, 1932, the plaintiff corporation was the sole owner and in possession of all the property insured, which was then stored in said factory and which is claimed to have been destroyed by said fire, and the nature and value of which is fully set forth in said Plaintiff's Exhibit B.

Fourth. That the plaintiff did immediately after the occurrence of the fire, to wit, on March 13 and 14, 1932, furnish the defendant insurance company with a written notice of the occurrence of the fire and of the loss; that thereafter, and within the time fixed in the policy, the plaintiff furnished to the said defendant company a sworn statement or proof of the loss sustained by the plaintiff as the result of the said fire of March 13, 1932, which proof of loss was accepted by the defendant company; and that the plaintiff did also submit to the inspection of the defendant company all its books of account, inventories and vouchers and all

such other additional information and details as were reasonably required by the defendant company, with reference to the claim made by the plaintiff, the causes of the fire and the amount of the loss; and that the plaintiff has otherwise duly performed all the conditions of the said policy of insurance, on its part.

Fifth. That from the date of the fire to the date of the bringing of this action the said defendant has wholly failed and refused to recognize any responsibility, or assume any liability with respect to the said policy of insurance, or to make any payment or settlement of any kind on account thereof, although the said plaintiff, through its attorney, has urged and demanded such settlement and payment of and from the defendant.

Wherefore, the plaintiff corporation prays that judgment be entered against the defendant insurance company for the sum of thirty thousand dollars ($30,000), with interest [fol. 5] thereon at the rate of six percentum (6%) per annum from the date of this complaint until the date of payment and for the costs and disbursements of this suit.

San Juan, P. R., May 19, 1933.

Martin Travieso, Attorney for Plaintiff.

Duly sworn to by Jose Rivera Soler. Jurat omitted in printing.

In United States District Court

Answer—Filed June 2, 1933

Comes now the United Firemen's Insurance Company of Philadelphia, by its undersigned attorneys, and answering the second amended complaint filed herein alleges and says:

I. For lack of information and belief denies that plaintiff [fol. 6] is a corporation organized and existing under the laws of Puerto Rico, having its office and factory at San Juan, and/or that it has been engaged since its organization or otherwise in the business of buying, selling, handling and/or dealing in cloth, textiles and/or dry goods

and/or in the manufacture and/or conversion thereof by hand labor and/or by machine or otherwise into finished products on its own account and/or as broker and/or representative of other persons, firms and/or corporations or otherwise.

Defendant admits all other facts alleged in the first allegation of the second amended complaint.

II. Admits the facts alleged in the second allegation of the second amended complaint.

III. Admits that early in the morning of the 13th of March, 1932, a fire occurred in the building described in the second amended complaint, but denies that at that time the policy of insurance mentioned therein was in full force and effect and denies that said fire destroyed all the machinery and all the merchandise and property installed and/or stored in said building.

Defendant further specifically denies that the property detailed and specified in Exhibit B, joined to the record in this case, or any part thereof with the exception of a small amount of machinery was ever stored in the building described in the second amended complaint or was over destroyed and/or damaged or affected by the fire mentioned therein.

Defendant further denies that the property schedules in said Exhibit B had the value given to it by plaintiff in said Exhibit B.

Defendant also denies that at the time of the fire mentioned in the said amended complaint, or at other time, the plaintiff was the sole owner and/or in possession of all the property insured, and/or which was stored in the factory described in said amended complaint and which is described and valued in the Exhibit B joined by plaintiff to the pleadings herein.

IV. Defendant admits that plaintiff notified the occurrence of the fire to defendant as alleged in the said amended complaint and that plaintiff furnished defendant with a sworn statement or proof of the loss which plaintiff alleged it sustained as a result of the fire mentioned and [fol. 7] that said proof was accepted by defendant but not as to the allegations and statements contained in same, defendant alleging that it accepted only the delivery of said document as such.

Defendant denies for lack of information and belief that plaintiff submitted for inspection to defendant all of its books of account, inventories and/or vouchers and/or all other information and details as were reasonably or otherwise required by the defendant, with reference to the claim made by plaintiff, the causes of the fire and/or the amount of that or otherwise, and defendant denies that plaintiff has duly, or otherwise, performed all the conditions of the policy of insurance.

V. Defendant admits the facts alleged in the 5th allegation of the second amended complaint.

VI. For defenses the defendant alleges:

(a) That the policy of insurance mentioned in the second amended complaint was issued by defendant and accepted by plaintiff subject to the following condition:

"12. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the Insured or anyone acting on his behalf shall hinder or obstruct the Company in doing any of the acts referred to in Condition 11; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited."

That in accordance with the provisions of said condition plaintiff has no right to indemnity under the policy to which this case refers because on or about the 23d of March, 1932, plaintiff filed with defendant its proof of loss under oath claiming indemnity from defendant in the total sum of $30,000 and stating under oath that its property destroyed or affected or damaged by the fire mentioned [fol. 8] herein had a value on the date of said fire of $35,926.01 when the truth is that the property located in the building damaged by said fire did not have a value in excess of the sum of $5,000.

Defendant alleges on information and belief that when plaintiff prepared, swore to and filed with defendant the above mentioned proof of claim it knew that the real value of all the property affected by said fire did not exceed the sum of $5,000 and that plaintiff wilfully and voluntarily and in bad faith, and with the sole purpose and intent of defrauding defendant, stated in said proof that the value of said property was $35,926.01 and claimed from defendant the sum of $30,000.

(b) That plaintiff violated the condition copied in the preceding allegation and is deprived of all right to indemnity under the insurance policy the subject of this litigation, because in the proof of claim mentioned above the said plaintiff stated under oath that all the property alleged to have been destroyed or damaged by the fire the subject of this controversy was without exception the sole and unconditional property of plaintiff, when the truth was, according to defendant's information and belief, that a great part of the property affected by said fire did not belong to plaintiff, but to third parties that had deposited same with plaintiff and another part was encumbered with chattel mortgages and other liens in favor of third parties.

Defendant alleges on information and belief that the above facts were well known to plaintiff when it signed, swore to and delivered to defendant the above mentioned proof of claim and that said false representations and claims were made by plaintiff with the sole purpose and intent of deceiving and defrauding defendant.

(c) That plaintiff also violated the condition copied in preceding allegation and thereby lost all right to indemnity under the policy of insurance to which this case refers because in the sworn proof of claim filed by plaintiff with defendant, as aforesaid, plaintiff stated that the properties damaged by the fire were not protected against any risk by any other insurance, and defendant alleges on information and belief that a great part of the property damaged was insured against the risk of fire by other insurance in [fol. 9] favor of the owners thereof and that said owners were fully paid and indemnified for the loss suffered by them under said other insurance and have made no claim or demand for indemnity of plaintiff, and defendant further alleges on information and belief that at the time that

plaintiff prepared, swore to and filed with defendant said proof of claim, plaintiff knew of said additional insurance and of the indemnity paid under same and that plaintiff by concealing said other and additional insurance acted in bad faith and with the sole purpose and intent of defrauding defendant.

(d) That plaintiff has no right to indemnity under the policy of insurance the subject of this litigation because according to defendant's information and belief the fire mentioned in said amended complaint was caused by the intentional and fraudulent acts of plaintiff's officers and employees or by persons acting in collusion or connivance with the officers, agents and employees of plaintiff corporation.

(e) That to the policy of insurance issued by defendant and mentioned herein, and to form a part of same, a condition known as "The Iron Safe Clause" was attached, which copied literally reads as follows:

"The following covenant and warranty is hereby made a part of this policy:

1st. The Assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date and upon demand of the Assured the unearned premium from such date shall be returned.

2nd. The Assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause and during the continuance of this policy.

3rd. The Assured will keep such books and inventory, and also the last preceding inventory if such has been [fol. 10] taken, securely locked in a fireproof safe at night, and at all times, when the building mentioned in this policy is not actually open for business; or failing in this, the Assured will keep such books and inventories in some place

not exposed to a fire which would destroy the aforesaid building.

In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void."

That plaintiff defaulted all right to indemnity under the policy of insurance to which this case refers because it violated and failed to conform and comply with the provisions of said "Iron Safe Clause" in that it failed to keep a set of books of accounts in accordance with the provisions of said "Iron Safe Clause" and that it was and is impossible to determine in any form whatsoever from the books of account, papers and documents kept by plaintiff and delivered to defendant the amount and value of the property in the building described in the insurance policy at the time of said fire.

Wherefore, defendant prays that the second amended complaint field herein be dismissed, with costs.

San Juan, P. R., June 2, 1933.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, Attorneys for Defendant, by G. E. Gonzalez.

[fol. 11] *Duly sworn to by Jorge Saldana. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—May 7, 1934

This case is called for trial. Both parties answer ready. Martin Travieso, Esq., appears in behalf of the plaintiff; J. H. Brown, Esq., and G. E. Gonzalez, Esq., in behalf of the defendants.

Thereupon, a lawful jury is duly empanelled and sworn to try the issues of the case composed of the following persons to wit:

1. Juan B. Figueroa,
2. Victor J. Costas,
3. E. S. Steele,
4. Luis A. Bas,
5. Ramon Rodriguez Texidor,

6. Hector Sanchez,
7. Carlos B. Brandariz Castro,
8. J. Gus Lallande,
9. C. S. Whall,
10. S. C. Friedman,
11. F. S. Romeu,
12. Ralph Swiggett,

who hear testimony in behalf of the plaintiff, and it being the adjournment hour, the further trial of the case is continued until Tuesday, May 8, 1934, at 9 a. m.

JOURNAL ENTRY—May 8, 1934

The trial of this case resumed, all parties and the jury being present as of yesterday.

Thereupon, the court and jury hear further testimony in [fol. 12] behalf of the plaintiff and, it being the adjournment hour, the further trial of the case is continued until Wednesday, May 9, 1934, at 9 a. m.

JOURNAL ENTRY—May 9, 1934

The trial of this case resumed, the jury and all parties being present as of yesterday.

Thereupon, further testimony in behalf of the plaintiff heard. It being the adjournment hour, the further trial of the case is continued until Thursday, May 10, 1934, at 2 p. m.

JOURNAL ENTRY—May 10, 1934

The trial of this case is resumed, all parties and the jury being present as of yesterday.

Thereupon, the remainder of testimony in behalf of the plaintiff heard and plaintiff closes its case. It being the adjournment hour, the further trial of the case is continued until Friday, May 11, 1934, at 9 a. m.

JOURNAL ENTRY—May 11, 1934

The trial of this case is resumed, all parties and the jury being present as of yesterday.

Thereupon, testimony of witnesses in behalf of defendant heard. It being the adjournment hour, the further trial of the case is continued until Saturday, May 12, 1934, at 9 a. m.

JOURNAL ENTRY—May 12, 1934

The trial of this case is resumed, the jury and all parties being present as of yesterday.

Thereupon, further testimony in behalf of defendant heard, and it being the adjournment hour, the further trial of the case is continued until Monday, May 14, 1934, at 9 a. m.

JOURNAL ENTRY—May 14, 1934

The trial of the above-entitled case which was continued on May 12, 1934, to this date, resumed, all parties and jury being present.

Thereupon, further testimony in behalf of the defendant [fol. 13] heard, and it being the adjournment hour, the further trial of the case is continued until Tuesday, May 15, 1934, at 9 a. m.

JOURNAL ENTRY—May 15, 1934

The trial of the above case resumed, the jury and all parties being present as of yesterday.

Thereupon, the court and jury hear the remainder of testimony in behalf of the defendant, and testimony in rebuttal, and at the close thereof the defendant moves for a directed verdict in its favor, which motion is argued and, being duly considered, is denied. An exception is noted by defendant to the court's ruling.

The further trial of the case is continued until Wednesday, May 16, 1934, at 9 a. m.

JOURNAL ENTRY—May 16, 1934

The trial of this case is resumed, all parties and jury being present as of yesterday.

Thereupon, argument of counsel, instructions of the court on the law in the case heard, and the jury retire to consider of their verdict.

JOURNAL ENTRY—May 17, 1934

Come the jury in this case and return into open court a sealed verdict, which verdict is opened by the clerk and read and is as follows, to wit:

VERDICT

"We, the jury, find for the plaintiff and assess its damages in the sum of $17,000 (seventeen thousand dollars) — cents, plus interest at 6 percent.

E. S. Steele, Jr., Foreman.

The clerk is directed to file the verdict of record and the jury is discharged from further consideration of the case.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION FOR DIRECTED VERDICT—Filed May 15, 1934

Now comes the defendant, by its attorneys, at the close of all of the evidence in the above-entitled cause and moves the court to direct a verdict for said defendant upon the cause of action alleged in plaintiff's complaint, and to instruct the jury to return a verdict for said defendant on the following grounds:

I. "Iron Safe Clause." That it appears from uncontroverted evidence that plaintiff failed to comply with the provisions of the "Iron Safe Clause" which forms a part of the contract of insurance in that:

(a) Plaintiff did not take an inventory, either within twelve calendar months prior to the date of the policy, or within thirty days of the issuance of the policy, of the stock

of merchandise contained in the building described in the policy held in trust or in commission or consignment or on joint account with others or for which the assured was legally liable, nor of merchandise purchased by plaintiff between December 31, 1931, and the date of the fire.

(b) Plaintiff did not keep a set of books from which it is possible to determine (1) the cost of labor performed by plaintiff on merchandise contained in the premises described in the policy at the date of the fire; (2) the amount and classes of merchandise delivered to plaintiff for embroidery or manufacture by third persons or entities and contained in the said premises on the date of the fire and/or (3) the amounts and classes of "raw materials for production" contained in said premises on the date of the fire.

(c) That the books kept by plaintiff do not clearly and plainly present a complete record of plaintiff's business transacted including all purchases, sales and shipments both for cash and credit.

II. "Proof of Claim." That plaintiff failed to comply with the provisions of paragraph (a) of Article 10 of the policy of insurance in that it did not present a proof of claim indicating in detail the amounts and classes or kinds of materials for manufacture (materiales de elaboracion), materials manufactured and unmanufactured (mercancias elaboradas y sin elaborar) and/or details as to cost of manufacture claimed to have been destroyed by fire and for the loss of which it demanded indemnity under the policy.

[fol. 15] III. Fraudulent claim and false declarations. That the claim presented by plaintiff to defendant was false and fraudulent as a matter of law in that:

(a) According to the testimony of Jose Rivera Soler, president of plaintiff, the claim for cost of labor in the amount of $2,524.50 included the cost of materials supplied by plaintiff and plaintiff's manufacturing profit.

(b) That the cost appearing in the books of machinery and merchandise sold by Jose Rivera Soler, president of plaintiff corporation, exceeds the price paid for such machinery and merchandise by the said Jose Rivera Soler and includes profits made on such transactions by the said Jose Rivera Soler, amounting to over fifty percent.

(c) That the claim was wilfully and knowingly, false and fraudulent in that plaintiff included in the value of the articles for which it claims indemnity profits made by its president, Jose Rivera Soler, on machinery and merchandise that it was his duty to purchase as agent of plaintiff corporation and which he purchased for the purpose of reselling to plaintiff corporation.

(d) That the books, vouchers and invoices presented by plaintiff have been changed and falsified in respect to entries for machinery and merchandise.

Henri Brown, by G. E. Gonzalez, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT—

PLAINTIFF'S REQUESTS TO CHARGE—Filed May 16, 1934

The plaintiff herein, by his undersigned attorney, respectfully requests the court to charge the jury as follows:

Request Number One. "If you believe, from the evidence before you, that the plaintiff, within the time fixed in the policy, furnished to the defendant company what purported to be proofs of loss, though not in exact conformity with the terms of the policy, and that these proofs were accepted by the company without objection or without suggesting that they did not conform to the terms of the policy and objecting to them for that reason, then the defendant is estopped from claiming that such proofs were insufficient."

[fol. 16] Request Number Two. "If you believe from the evidence that the plaintiff furnished to the defendant company, in due time, what purported to be proofs of loss and that they were objected to upon the ground that they were not in exact conformity with the terms of the policy, still, if you further believe, from the evidence, that the defendant then denied any liability to the plantiff under said policy, and declared that the company would not pay any alleged claim thereunder, then such declarations amounted to a waiver of any further proofs of loss, and the plaintiff was not under obligation to furnish any others."

Request Number Three. "I charge you that the rule of law governing the interpretation of contracts of insurance

is, that where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception to the general rule rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted."

[In margin:] This is a matter for the court and not jury.

"The covenant and agreement contained in the policy before you, which provides that 'The Assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause (Iron Safe Clause) does not mean such books as would be kept by an expert book-keeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly satisfy a man of ordinary intelligence of the truth of the claim."

See London & L. Insurance Co. v. Kearney, 180 U. S. 132.

Request Number Four. "The defendant company has alleged as one of its defenses that according to its information and belief the fire which destroyed plaintiff's property was caused by the intentional and fraudulent acts of plaintiff's officers and employees or by persons acting in collusion or connivance with such officers and employees. Upon that issue, the defendant company has the affirmative, and it must satisfy you by a preponderance of the evidence that [fol. 17] this plaintiff either directly or indirectly caused the destruction of the property by fire, in order to entitle it to the defense it has set up. If the evidence before you does not fully satisfy and convince you that the fire was caused by the voluntary act of the plaintiff or if said evidence leaves you in doubt as to the truth or falsity of the charge made by the defendant against the plaintiff, then it is your duty in either case to disregard the said charge and to find for the plaintiff on the said issue."

Request Number Five. "The defendant has also alleged as one of its defenses that some of the property covered by the policy of insurance upon which this action is based, was also covered by other insurance; that the plaintiff failed to give notice of such further insurance to the defendant

company; and that the failure to so notify the defendant voids the policy.

"Upon this issue I charge you that 'double insurance' exists when it is shown by competent evidence that the same person is insured by several insurers separately in respect to the same subject matter and the same interest. The alleged 'other insurance' or 'double insurance' must cover the same property or interest covered by the policy sued upon.

"Owners of different interests on the same property may respectively insure their interests without violating provisions in their policies prohibiting other insurance.

"The evidence presented in this case shows that plaintiff is claiming payment of certain sums paid by it for the cost of labor performed in the process of manufacturing pillow cases, dresses, table cloths, napkins, etc. with materials furnished to the plaintiff by other persons who were the owners of such materials. The insurance of such materials, by the owners thereof, in other companies, either before or after the issuance of the policy upon which this suit is based, does not constitute double insurance, and I charge you that the taking of such insurance is not a violation of the provisions of the policy in favor of the plaintiff.

"The burden of proving that a prior or a subsequent policy covers the same property or the same interest covered by the policy upon which this action has been brought is on the defendant insurance company. The only evi- [fol. 18] dence introduced at this trial with reference to the existence of another policy of fire insurance was the testimony of the witness Adolph Esteffens, as insurance adjuster, who was employed by the —— Insurance Company to adjust the loss suffered by Handcraft Import Company, for materials and goods destroyed by the fire to which the present action refers. The testimony of said witness, who was introduced by the plaintiff, indicates that the Handcraft Import Company had insured the ownership of materials which they had furnished to Rivera Soler & Co., for purposes of maunfacturing and converting them into finished products. Apparently the claim was found correct and adjusted. No evidence has been introduced by defendant to show that the Handcraft Import Company has made any claim for indemnity under the policy upon which this action is based. The plaintiff

is claiming indemnity for the loss of what it paid for labor put in goods in process of manufacture and in the finished products that are alleged to have been destroyed by the fire.

"I charge you, upon that evidence, that the defense of double insurance has not been established by the defendant and that you should disregard it entirely." (See Cooley's Brief on Insurance, Vol. II, pages 1843 to 1848.)

Request Number Six. The plaintiff has shown, by the testimony of Sebastian Solo, a broker of San Juan, that it was the said Solo who introduced Manual I. Saldana, the agent of the defendant insurance company, to Jose Rivera Soler, the president of the plaintiff corporation; that the purpose of the introduction was to discuss the issuance of a policy of insurance on the life of said Rivera Soler; that after said discussion, Saldana, defendant's agent, started a discussion about the insurance against fire of the factory of the plaintiff; that the three of them, Saldana, Rivera and Solo, made a thorough inspection of the premises and of machines, merchandise and other property in the building; that Rivera Soler wanted to insure the plaintiff's property for a small amount but Saldana, defendant's agent, insisted that he should insure for the full value of the property, that being the sum of thirty thousand dollars, stating that, if the property was insured for less than its total value, in case of loss by fire the plaintiff company would be [fol. 19] considered to be its own insurer for the amount not covered by the policy.

[In margin:] Modified.

I now charge you, that if you believe from the uncontradicted testimony of Sebastian Solo that the defendant's agent, at the time of the filing of the application for insurance, saw the insured property and not only assented to the valuation placed thereon but advised the plaintiff to insure it for the full amount of said valuation, and that the defendant company collected a premium on such basis, then the defendant company is estopped to set up overvaluation as a defense. (See Cooley's Briefs on the Law of Insurance, Vol. III, page 2657; German Insurance Company v. Miller, 39 Ill. App. 633.)"

[In margin:] This being an open and not a valued policy this request must be modified.

Request Numer Seven. "The policy upon which this action is based contains what is known as 'The Iron Safe Clause.' By the terms of said covenant the insured is required: (1) To take a complete inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of the policy, the insured shall take an inventory within thirty days of the issuance of the policy; (2) To keep a set of books, from the date of inventory as provided in paragraph (1), and during the continuance of the policy; and (3) To keep the books and inventory and also the last preceding inventory, if one has been taken, securely locked in a fireproof safe at night.

"It has been settled, by the weight of authority, that the iron safe clause, where properly made a part of the policy, is a promissory warranty, which must be regarded as a condition subsequent, for the reason that all of the promises therein contained are required to be performed by the insured from and after the date of issuance of the policy. It being a condition subsequent, it should be construed strictly against the right of forfeiture of the policy.

"The defendant company has set up as a defense the alleged failure of the plaintiff to comply with the requirements of the "iron safe clause," charging as a specfiic violation [fol. 20] that the plaintiff failed to conform and comply with the provisions of said clause in that it failed to keep a set of books of accounts in accordance with the provisions of the said clause, and that it is impossible to determine from said books, papers and documents kept by the plaintiff the amount and value of the property destroyed by the fire.

"I charge you that a substantial compliance with the terms of the iron safe clause is sufficient; that you are the sole judges as to the sufficiency and weight of the evidence introduced by the plaintiff to satisfy you as to what was in its factory at the time of the fire and destroyed thereby; that it is for you to determine, from the books, papers and documents admitted as evidence and from the oral testimony presented by both sides, whether any property covered by the policy was destroyed by the fire of March 13th, 1932, and the market value thereof. (See Cooley's Briefs

on the Law of Insurance, Vol. II, p. 1814; Western Ass. Co. v. Redding, 68 Fed. 708; L. & Liverpool Ins. Co. v. Kearney, 94 Fed. 314; Jones v. Southern Ins. Co., 38 Fed. 19; L. & L. Insurance Co. v Kearney, 180 U. S. 132; 45 L. Ed. 460."

Martin Travieso, Attorney for Plaintiff.

May 15, 1934.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS FOR INSTRUCTIONS—Filed May 16, 1934

The defendant insurance company requests that the court give the following instructions to the jury:

1. You are instructed that the policy of insurance, the subject of this litigation, contains a condition which reads in part as follows:

"If the claim made by the insured (in this case by J. Rivera Soler as president of J. Rivera Soler & Co., Inc) be in any respects fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy—all benefit under this policy shall be forfeited."

Such a condition is fair, valid and enforceable and you should keep the words thereof clearly in mind.

This condition required the insured to make honest and [fol. 21] truthful representations and statements as to the property affected by the fire and as to the value of the said property at the time of the fire. By the terms of the policy any false and fraudulent statements or representations regarding the value of said property render the policy void.

[In margin:] Good faith in making statements will allow latitude in estimating value.

I charge that if you find that any of the values specified in the proof of loss furnished by the plaintiff to the defendant company were too high or exaggerated, and that the plaintiff caused or permitted the furnishing of such a claim for amounts greatly in excess of the amounts that the officers of

the plaintiff corporation knew that such articles were worth with the intention and expectation of getting a greater amount of money for said articles than they were in fairness worth, then the plaintiff corporation was guilty of such fraudulent conduct as would make the policy void, and if you so find your verdict should be for the defendant.

I further charge you that any statements made by the officers and agents of the plaintiff corporation concerning the amount or value of the property alleged to have been destroyed, or any statements as to the condition and value of said property written in the proof of claim, or made here on the witness stand, and that were made fraudulently and with intention of fraud, would render the policy void.

The court further instructs you that if you believe by a preponderance of the evidence that any officer or agent of the plaintiff corporation submitted to the defendant in support of its claim any books containing any false entries or any fraudulent or false invoices for merchandise or machinery never received or for work never done, or increasing and exaggerating the value of any property alleged to have been destroyed by the fire, the verdict should be for the defendant.

2. I charge you that the burden of establishing fraud rests upon the defendant company. Such fraud on the part of the plaintiff must be established by a preponderance of the evidence. You are to consider the proof of loss sub-
[fol. 22] mitted by the plaintiff to the defendant, which is in evidence, and all the circumstances and facts to which the testimony of the witnesses has referred regarding the filing of said proof of claim and the facts and book entries submitted to substantiate the same and all other circumstances regarding the condition of the property and the nature and origin thereof.

I further charge you that fraud need not be established by direct proof. In a great majority of cases where fraud exists, it becomes impossible to bring witnesses who can give direct proof that fraud exists. For this reason it may be established by circumstances that convince you that fraud was actually intended and committed by the plaintiff. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires.

[In margin:] These circumstances must preponderate over other testimony to the contrary.

3. I further charge you that if from the evidence produced at this trial you believe that the officers of the plaintiff corporation knowingly and willfully made false statements regarding material facts set out in the proof of loss submitted to the court regarding the value and amount of property destroyed, the intention to deceive the defendant company must be necessarily implied as a natural consequence of said acts and you must then find for the defendant.

In cases of this kind the plaintiff must come into court with clean hands. The insured is presumed to know better than anyone else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims unless honestly made. It is intended to protect insurance companies from frauds which might otherwise be perpetrated on them and it is a rule which can do an honest man no harm.

[In margin:] It is also a matter of public policy.

4. You are instructed that there is no evidence from which the cost of labor claimed in the complaint and in the proof of claim, in the amount of $2,524.50, can be determined and that as to so much of the said claim you should find for the defendant.

[In margin:] Modified.

[fol. 23] 5. You are instructed that, in assessing the value of any machinery sold by Jose Rivera Soler to plaintiff corporation while he was president thereof, any profit made by said Jose Rivera Soler should be deducted.

6. You are instructed that as to merchandise covered by the policy of insurance, plaintiff is entitled to recover the market value thereof as of the date of the fire and loss and that the burden is upon the plaintiff to prove the value of said merchandise at such time, and that if you find that the plaintiff has failed to establish such values your verdict should be for the defendant.

[In margin:] Modified. Plaintiff must show same value.

7. The court instructs the jury that it was the duty of the plaintiff to take a complete itemized inventory of its stock on hand within thirty days of the issuance of the policy unless such inventory had been taken within twelve calendar months prior to the date of the policy and that failure to so do would render the policy null and void. In this respect you are instructed that if you find that the inventory of December 31st, 1931 presented in evidence by plaintiff does not constitute such complete itemized inventory of stock covered by the policy of insurance, then your verdict should be for the defendant.

8. You are instructed that any indemnity for destruction of merchandise covered by the policy of insurance is measuered by the market value of such merchandise at the time or immediately after the date of the destruction of such merchandise by fire.

[In margin:] Modified.

9. You are instructed that there is no evidence from which you can determine the market value of merchandise sold by J. Rivera Soler, president of the plaintiff corporation, while the said Jose Rivera Soler was such an officer of the plaintiff corporation, to said plaintiff, and that plaintiff can recover no indemnity for the loss of the merchandise so sold.

San Juan, P. R. May 15, 1934.

——— ———, ——— ———, Attorneys for Defendant.

[fol. 24] IN UNITED STATES DISTRICT COURT

ADDITIONAL INSTRUCTIONS REQUESTED BY DEFENDANT—Filed May 16, 1934

Defendant respectfully requests that the court instruct the jury as follows:

A. You are instructed that the burden of proof rests upon the plaintiff to establish by a preponderance of evidence the amount of articles and merchandise insured under the policy that was in the building described in the policy at the time of the fire and that was destroyed by fire and also the value of such articles and merchandise as of that date.

B. You are instructed that the several amounts in dollars fixed by the policy in no wise evidence any agreement as to the value of the different groups of articles and merchandise described in the policy, but represent the maximum sums or indemnities that the insurer agrees to pay provided that the fair value of the property belonging to any or all of the three groups, namely, merchandise, machinery and furniture and fixtures, destroyed by fire at the time of such fire equals or exceeds the maximum amounts so fixed as indemnity.

San Juan, P. R., May 16, 1934.

G. E. González, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

VERDICT—May 17, 1934

We, the jury, find for the plaintiff and assess its damages in the sum of $17,000 (seventeen thousand dollars) and — cents, plus interest at 6 percent.

E. S. Steele, Foreman.

IN UNITED STATES DISTRICT COURT

JUDGMENT—May 31, 1934

On the seventh day of May, 1934, this cause came on for trial before the court and a jury to be therein duly impaneled; Martin Travieso, Esq., appearing as counsel for the plaintiff, and J. Henri Brown, Esq., appearing as counsel for the defendant; and the parties herein now being ready to proceed to trial, and the court having ordered that [fol. 25] the trial be proceeded with, a jury was thereupon impanelled and sworn as the jury to try this cause; and on said May 7, 1934, and on the following days of May 8, 9, 10, 11, 12, 14, 15 and 16, 1934, testimony having been adduced, and exhibits admitted, on behalf of both parties, and the testimony being closed, and said cause, after argument by respective counsel, and instructions of the court having been submitted to the jury for its consideration and verdict, and the jury, on the seventeenth day of May, 1934, having re-

turned into court, and having submitted its verdict, which was read by the clerk, and was as follows, to wit:

"We, the jury, find for the plaintiff and assess its damages in the sum of $17,000 plus interest at 6 percent.

E. S. Steele, Foreman."

and the court having ordered that judgment in accordance with the verdict of the jury be entered;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered and adjudged and decreed that the plaintiff, Jose Rivera Soler & Co., Inc., do have and recover from the defendant, United Firemen's Insurance Company of Philadelphia, a corporation, the sum of seventeen thousand dollars ($17,000) with interest at the rate of six percentum (6%) per annum from October 11, 1932, the date of the filing of the complaint, to the date of final payment, together with its costs and disbursements in this behalf, to be taxed.

Judgment entered at San Juan, Puerto Rico, this thirty-first day of *of* May, A. D. 1934.

Lulu G. Donohue, Clerk.

Notified with copy May 26, 1934.

J. Henri Brown, Attorney for Defendant.

Memorandum: Petition for Appeal, filed June 9, 1934; order allowing appeal filed June 9, 1934; supersedeas bond on appeal—$22,000—United Firemen's Insurance Company of Philadelphia, principal, Maryland Casualty Company as [fol. 26] surety—filed June 12, 1934; citation issued June 12, 1934, served on June 15, 1934, are here omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 9, 1934

Comes now the United Firemen's Insurance Company of Philadelphia, defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal petitioned for in said cause from the judgment of this court entered on the thirty-first day of May, 1934:

1. The court erred in denying the motion of the defendant, made at the close of all of the evidence, that the court direct a verdict in favor of the defendant and against the plaintiff.

2. The court erred in refusing to direct a verdict in favor of the defendant upon the ground that plaintiff did not take an inventory either within twelve calendar months prior to the date of the policy, or within thirty days of the issuance of the policy, of the stock of merchandise contained in the building described in the said policy and covered thereby as required by the "Iron Safe Clause" which formed a part of the said policy.

3. The court erred in refusing to direct a verdict in favor of the defendant upon the ground that plaintiff did not keep a set of books from which it is possible to determine the cost of labor performed by plaintiff upon merchandise contained in plaintiff's factory at the date of the fire and loss or of the amounts of said insured merchandise within said premises at the time of the fire, as required by the terms of the "Iron Safe Clause" which formed a part of the policy of insurance.

4. That the court erred in refusing to direct a verdict in favor of the defendant upon the ground that the plaintiff did not keep a set of books which clearly and plainly present a complete record of plaintiff's business transacted including all purchases, sales and shipments both for cash and credit as required by the provisions of the "Iron Safe Clause" forming a part of the policy.

5. That the court erred in denying defendant's motion for a direction of verdict upon the ground that plaintiff failed to comply with the provisions of paragraph (a) of [fol. 27] Article 10 of the policy of insurance in that it did not present a proof of claim indicating in detail the amounts and classes or kinds of merchandise and materials for manufacture, merchandise manufactured or unmanufactured and of the labor costs on such merchandise and materials claimed to have been destroyed by fire and for the loss of which it demanded indemnity under the policy.

6. The court erred in denying defendant's motion for a direction of verdict upon the ground that it appeared from the evidence as a matter of law that the claim presented by

plaintiff to defendant was false and fraudulent in that plaintiff knowingly and intentionally included in said claim gross over valuations of machinery, furniture and fixtures and merchandise.

7. The court erred in denying defendant's motion for a directed verdict upon the ground that plaintiff had presented in support of its claim false and fraudulent books and invoices.

8. The court erred to the prejudice of defendant in modifying the 4th request for instructions submitted by defendant which read: "You are instructed that there is no evidence from which the cost of labor claimed in the complaint and in the proof of claim in the amount of $2,524.56 can be determined and that as to so much of the said claim you should find for defendant", by adding thereto the following: "Now I charge you that, with this modification, unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise, if you find the evidence—I do not recall it; but if you find it from the record then you can find only for such amount as the plaintiff actually paid for labor", because the books contained no entries showing either the cost of the labor performed on materials or the amount of materials or merchandise destroyed or damaged by fire on which such labor had been performed.

9. The court erred in refusing to give to the jury the following instruction requested by the defendant: "You are instructed that there is no evidence from which you can determine the market value of merchandise sold by J. Rivera Soler, president of plaintiff corporation, while the said Jose Rivera Soler was such officer of the plaintiff cor- [fol. 28] poration, to said plaintiff, and that plaintiff can recover no indemnity for the loss of the merchandise so sold."

10. That the verdict and judgment are contrary to law in that the amount of loss found by the jury in the said verdict considered in connection with the admissions of plaintiff and the evidence of plaintiff is inconsistent with any theory other than that of fraudulent over valuation in plaintiff's sworn proof of loss.

Wherefore, defendant prays that the said judgment may be reversed and for such further and other relief as to the court may seem just and proper.

June 9, 1934.

G. E. Gonzalez, Attorney for Defendant.

Notified with copy June 9, 1934.

Martin Travieso, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME TO FILE BILL OF EXCEPTIONS AND RECORD ON APPEAL—Filed July 19, 1934

Comes now the United Firemen's Insurance Company of Philadelphia, defendant-appellant in this case, by its undersigned attorneys and alleges:

1. That on the — day of June, 1934, the defendant took an appeal in this case to the United States Circuit Court of Appeals for the First Circuit from the judgment entered herein on the 31st of May, 1934.

2. That a citation on appeal issued from the office of the clerk of this court according to law, and that the said citation is returnable at the said Circuit Court of Appeals on the — day of August 1934.

3. That the attorneys for the defendant have been engaged in the preparation of the bill of exceptions to be filed to perfect said appeal but because of the great amount of testimony to be included in said bill of exceptions and the large number of exhibits to be transcribed therein it will be impossible for the defendant to file said bill of exceptions in this court before the — day of August, 1934, [fol. 29] and that it will be impossible to have the said bill of exceptions settled by this court and the record on appeal filed in the United States Circuit Court of Appeals for the First Circuit before said date.

4. That the Honorable Judge of this court is leaving for continental United States on the 21st of July, 1934, and that for said reason the defendant makes application for extensions to file the bill of exceptions and the record on appeal at this time.

For the reasons aforesaid defendant prays that the time within which this defendant should file the bill of exceptions in this case be extended until the tenth day of October, 1934, and that the time to file the record on appeal in the United States Circuit Court of Appeals for the First Circuit be extended until the tenth day of November, 1934.

San Juan, P. R. July 19, 1934.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, W. L. Butte, Attorneys for Defendant, by G. E. Gonzalez.

Notified with copy of this motion for extension of time, to which we consent, this nineteenth day of July, 1934.

Martin Travieso, Attorney for Plaintiffs.

Be it so. Robert A. Cooper, Judge.

July 20, 1934.

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME TO FILE BILL OF EXCEPTIONS—Filed October 10, 1934

Comes now the defendant, United Firemen's Insurance Company, by its undersigned attorneys, and respectfully alleges:

That it has finished typing the bill of exceptions to be filed in this case, which contains about three hundred pages; that the attorneys for defendant are checking and [fol. 30] correcting said bill of exceptions and they will be unable to finish said work this day.

Wherefore defendant prays for an extension of time until the 20th of October, 1934, to file said bill of exceptions in this case.

San Juan, P. R., October 10, 1934.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, Attorneys for Defendant, by G. E. Gonzalez.

Notified with copy and consented to October 10, 1934.

Martin Travieso, Attorney for Plaintiff.

JOURNAL ENTRY—October 11, 1934

The motion of defendant for extension of time to file bill of exceptions, and consented to by the plaintiff, is granted and the time to file the bill of exceptions herein is extended to October 20, 1934, as prayed.

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME TO FILE RECORD IN CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT—Filed November 2, 1934

Comes now the defendant insurance company, by its undersigned attorneys, and respectfully shows:

1. That defendant has filed in this case its bill of exceptions to perfect the appeal taken to the United States Circuit Court of Appeals for the First Circuit.

2. That said bill of exceptions has not yet been settled by this court.

3. That the time within which defendant should file its record on appeal in this case in the United States Circuit Court of Appeals for the First Circuit expires on the 10th of November, 1934.

That it will be impossible before said date to have said bill of exceptions settled by this court and the record on appeal transcribed by the clerk of this court and filed in said Circuit Court of Appeals.

[fol. 31] Wherefore, defendant prays that the time within which it shall fire the record on appeal in the Circuit Court of Appeals for the First Circuit be extended until the 10th of December, 1934.

San Juan, P. R., November 2, 1934.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, W. L. Butte, Attorneys for Defendant, by G. E. Gonzalez.

Notified with copy and consented to November 2, 1934.

Martin Travieso, Attorney for Plaintiffs.

ORDER

The time to file the record on appeal in the United States Circuit Court of Appeals for the First Circuit is hereby extended until the 10th of December, 1934.

Robert A. Cooper, District Judge.

November 2, 1934.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed October 18, 1934

Be it remembered that this cause came on for trial before a jury, before the Honorable Robert A. Cooper, judge of the District Court of the United States for the District of Puerto Rico, sitting at San Juan, Puerto Rico, on the seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, fifteenth and sixteenth days of May, 1934, the plaintiff, Jose Rivera Soler & Co. Inc., being represented by Martin Travieso, Esq., and the defendant, United Firemen's Insurance Company of Philadelphia, being represented by J. Henri Brown, Esq.

Whereupon, the trial of the case was commenced, and testimony produced, and proceedings had as follows, to wit:

The jury was selected and sworn to try the case.

[fol. 32] Statement of the case on behalf of plaintiff.

Statement of the case on behalf of defendant.

Thereupon, RAFAEL WOLF, a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct examination.

By Mr. Travieso:

My name is Rafael Wolf; I am a bookkeeper; I am acquainted with the firm of Rivera Soler & Co., Inc.; I am secretary and bookkeeper of that firm; I was bookkeeper for said company for three years. I have the books of the plaintiff company with me here in court.

[The witness produces the books and Mr. Travieso informs the court that he will offer said books, one by one,

for the purpose of identification, so as to later lay the foundation for the testimony of the accountant.]

The book that you are showing me is a ledger; the ledger of the firm of J. Rivera Soler & Co. Inc., which was kept by me; the entries in that book were made by me, they are in my handwriting.

[Mr. Travieso offers the book for identification and the same is marked "Identification No. 1 for Plaintiff".]

The book that you are showing me is a petty cash book belonging to J. Rivera Soler & Co. Inc., and I kept the same; the entries thereon were made by me, since 1931 to date.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 2 for Plaintiff".]

The book that you are showing me is a journal; the corporation used the system of vouchers; the entries are made on loose leaves; the vouchers are entered in the journal voucher book, which was kept by me. This book belongs to the plaintiff corporation and the entries thereon are in my own handwriting.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 3 for Plaintiff".]

This book that you are showing me is an inventory book of the firm Rivera Soler & Co. Inc.; this book was kept by me; my handwriting appears in those inventories.

[Mr. Travieso offers the book for identification and the same is marked "Identification No. 4 for Plaintiff".]

[fol. 33] The book that you are showing me is an account current book of the firm of J. Rivera Soler & Company, Inc.; this book was kept by me alone and the entries thereon are in my own handwriting.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 5 for Plaintiff".]

This book that you are showing me is the agents' book, a book carried by the corporation when merchandise was sent out on the island, which would be debited to the agents when it was sent out and when it was returned it would be credited to them; this book was a part of the book-

keeping system of Rivera Soler & Co. Inc., and was kept by me; the entries thereon were made by me.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 6 for Plaintiff".]

The book that you are showing me is a book representing the administration and general expenses of the firm of Rivera Soler & Co. Inc.; this book was kept by me and the entries thereon are in my own handwriting.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 7 for Plaintiff".]

This check book of The Royal Bank of Canada that you are showing me is the check book of J. Rivera Soler & Co. Inc.; this check book was kept by me; those checks were issued as they appear in the stubs.

[Mr. Travieso offers this check book for identification and the same is marked "Identification No. 8 for Plaintiff".]

The loose leafs numbered from 1 to 295 that you are showing me, which have at the top the words "Handcraft Import Company, Inc." are a book that might be termed an account current book; this book was kept only for one house, one of the most important houses that we dealt with, which was the Handcraft Import Company, Inc.; in this book was carried on the account of the merchandise that we received from that house, as well as the merchandise that we sent to them.

This book was kept by me; when I say the account current, I do not mean the account current between the Handcraft Import Company, Inc. and Jose Rivera Soler & Company; this is a book carried on in connection with the cur-[fol. 34] rent account of the merchandise only, and it was kept by me for the firm of J. Rivera Soler & Co.

[Mr. Travieso offers this collection of loose leaves for identification, and the same are marked "Identification No. 9 for Plaintiff".]

Those books that I have identified as belonging to the firm of Rivera Soler & Company are all the books of account of the firm, but I think there are several little books lacking; I can go and find them.

This book that I have in my hands is a notebook which was carried on in the name of Jacobson, Henry Bloch, and the Mothers Infant Wear Company, which were also houses from whom we received merchandise and to which we sent merchandise; this book was kept by me and it belongs to Jose Rivera Soler & Company, Inc.

[Mr. Travieso offers this book for identification and the same is marked "Identification No. 10 for Plaintiff".]

These books that I have identified as the books of the plaintiff corporation contain a complete record of the business transacted by the company; they include all the purchases and all the sales and all the shipments made by the company; these books, these very same books that I have identified were submitted to the insurance company after the fire; immediately after the fire, as soon as the insurance company asked us for them we sent them to the company; I am not very sure of the exact time that those books were kept in the possession of the adjuster for the insurance company; they were kept for some months, I am unable to state just how long, and were finally returned to the plaintiff by the insurance company; they were delivered to me and they have been in my possession since that time.

Mr. Travieso: I will have to reserve the right to call this witness later on, he being the bookkeeper; in case any entries in these books are challenged by the other side I will recall him, which would be in rebuttal, but in the course of the direct examination of my witnesses, I may have occasion to recall him for further examination.

Mr. Brown: I think if the witness is to be recalled I will reserve cross-examination for that time, as these books have been presented only for identification. I presume the witness will have to be examined as to their contents. No [fol. 35] cross-examination at this time.

and will give the result of his examination to the court and jury. In

The Court: Do you wish to offer the books in evidence?

Mr. Travieso: I want to offer the books in evidence at this time, they having been identified. The books naturally speak for themselves; they are silent witnesses. I propose to explain them for the court through an expert account-

ant, who has gone over these books and who will give the result of his examination to the court and jury. In my opinion that is higher evidence than that of the bookkeeper himself.

Mr. Brown: You offer the books now?

Mr. Travieso: I offer them in evidence so that they may be marked as exhibits for the plaintiff, with the same numbers as they already have.

Mr. Brown: I think the books are admissible for a limited purpose at this time, but I desire that the purpose for which they are admitted shall be strictly limited by the ruling of the court with regard to their admission. These books, I believe, are admissible at this time only for the purpose of showing, as part of the evidence of plaintiff, as to compliance with the requirements of the policy with regard to keeping books, as part of their proof. These books, I submit, are not admissible at this time as any evidence of what was in the factory at the date of the fire, because the correctness of the entries in those books has not yet been authenticated by any witness. So I have no objection to the admission of the books merely as part of the proof to show compliance with the iron safe clause.

[Mr. Travieso then admits that the admission of the books at this time is limited to show that the plaintiff complied with the iron safe clause; he admits the limitation suggested by Mr. Brown, and the court admits said books in evidence on that understanding. Mr. Brown defers cross-examination of the witness.

[The books admitted in evidence are marked "Exhibits 1 to 10 for Plaintiff".

[The witness withdraws and the court dismisses the jury until two o'clock in the afternoon.

[fol. 36] [The attorneys for plaintiff and defendant stipulate as to the fact that plaintiff is a corporation.

[Mr. Travieso then offers in evidence, with the acquiesence of counsel for defendant, the original policy upon which the action is based, and both counsel agree and stipulate that a copy of the printed English version of the policy, together with the original policy which is in Spanish, be considered as one document.

[This document is marked "Exhibit 11 for Plaintiff".]

JUAN I. GORBEA, witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Travieso:

My name is Juan I. Gorbea; I am a certified public accountant and practice my profession here in San Juan; I have been a certified public accountant for over ten years. I have been employed by the firm of J. Rivera Soler & Co. Inc. to make a study and audit of the books of Jose Rivera Soler & Company, Inc., which examination and audit I have made and I have also made a report of my findings from said examination of the books. The document that you are showing me is the report which I rendered, after completing my audit, to Mr. Rivera Soler, president of the corporation. It is a report on my examination and audit of the books of the corporation. In making said report I had before me the accounts of the Banco Comercial and of the Royal Bank of Canada.

[Mr. Travieso offers in evidence the statement of account of J. Rivera Soler & Co., Inc., with the Royal Bank of Canada, starting from October 22, 1931 to March 12, 1932, certified by the Royal Bank of Canada. This document is admitted in evidence and marked "Exhibit 12 for Plaintiff".]

The witness continues: The books that you are showing me are the books that I had before me and which I examined in order to make my report as to the showing of said books; in addition to those books I also examined vouchers, bills and other documents; I made a thorough check and investigation of each one of the items as entered in those books, from the vouchers. As a consequence of that [fol. 37] checking and examination I made out my report. According to what the books show the plaintiff has cash on deposit, fifty-seven cents; on deposit with the Porto Rico Railway Light and Power Company $61; accounts receivable, trade account, $769.99; inventory, raw material for production, $8,442.38; goods in process $2,524; manufactured goods in stock from surplus materials $5,186.38; fixed assets, machinery and tools, $13,854.28; furniture and fixtures, $3,825.49; prepaid expenses, unexpired insurance,

$298.35; printing and stationery, $110.25; suspense account, to Mr. Rivera to be accounted for, $500; in all $35,572.69. In rechecking this statement yesterday we found some mistake or discrepancy in the charge for what they call banquetes or bancadas; we found fifty banquetes which were included in the total price for the machines. I don't have the figures to state whether this difference brings the total of the loss down to $34,934.01. From the total of the assets, $35,572.69, we deduct cash in bank and for deposit, $61.57; accounts receivable, $769.99, and $500 to be accounted for, that makes $1,331.56, plus $875 for the banquetes, fifty banquetes; that makes a total of $2,303.66, which deducted from the grand total leaves a balance of $33,266.13.

Q. 1. I understood it was 56 banquetes; the total charge was for 86. I think the difference is 56, because the charge is 30 spaces for benches, at $19.50, $585, and 56 at the same price makes $1,092, according to my figures?

A. Yes, $33,149.13.

Q. 2. According to your report?

A. Yes, sir.

In the inventory we have raw material for production, $8,442.38. According to the books, folio 5 of the general ledger book, they have here a balance of $9,442.38 merchandise for production. Then I went item by item, checking all the vouchers which are here and I went to the inventory book to see the previous inventory for that account December 31, 1931, there is an inventory for raw material, or count. According to the inventory book, the last inventory practiced material for production. They have here 850 dozens of cotton, $297.50; 220 pounds of cotton goods, $660; 105 pounds of fibre silk thread and 98 dozens of sewing thread, $152.38; 36 kilos of embroidery thread, $378; 97 boxes of the same, $182.36; all together $2,324.74. But on [fol. 38] that amount we deduct material used during the months of January, February and March, 1932, $344.95, which amount corresponds to these two items, $22.95 plus $312. This is sustained by the corresponding vouchers there in the file. And now new merchandise bought since January 1st up to the last day of the rendering of this report, which amounts are there in the vouchers too. That is about to the balance of $8,442.38. Now goods in process, $2,534. Here is a voucher which is——.

Mr. Brown: I object to any testimony about a voucher until the voucher is put in evidence.

Mr. Travieso: I have there hundreds, perhaps thousands, which would encumber the record unnecessarily. I want the witness to identify the voucher first, and if it is material I will offer it in evidence. Otherwise I would have to introduce in evidence a thousand vouchers one by one, and perhaps 999 would be immaterial. The witness has just mentioned a certain voucher that corroborates his statement about checking the account. Now I will ask him to identify the voucher, and then I will submit it in evidence.

Mr. Brown: The witness has testified that he checked the book entries against certain vouchers. I think he should identify the vouchers that he used to check the book entries, but I don't think he should testify about the vouchers until they are in evidence.

The Court: He may identify the voucher.

The Witness: This voucher that I have in my hands is the same voucher that I used in checking this account about which I am testifying; I am sure that this is absolutely the same voucher; it is one of the vouchers of the bookkeeping system of J. Rivera Soler & Co. Inc., which I had before me in making this examination.

[Mr. Travieso offers this voucher in evidence. The court directs that it be shown to Mr. Brown and Mr. Brown objects, stating:]

Mr. Brown: I object to it. This is called a voucher. If this is a voucher I don't know what a voucher is. This witness has testified that he examined books submitted to him by the plaintiff in this case for examination, and together with those books they gave him certain vouchers which he used to check against the book entries. If he [fol. 39] had any previous knowledge of the books or vouchers he has not testified to it, and so far as his testimony is concerned, as to the vouchers, it is all pure hearsay, except that he examined these vouchers and checked them against the books. Now if these vouchers are to be used for any purpose, if your Honor please, they should be introduced in evidence by people who can testify as to what they were, and how they were obtained, where they got them. On its face, this is a mere statement by somebody. It is on a sheet of paper headed "Jose Rivera Soler & Co., Inc."

on which it says, "February 23, 1932, work in process, $4,153.50, cost of production, $4,153.50." It is not signed by anybody. There are no items or other checks. It is accompanied by a sheet written on the typewriter on which it says, "Labor cost and merchandise according to inventory of December 31, 1931", which totals the same amount, but just gives work on States merchandise for different periods.

Mr. Travieso: Your Honor please, I realize that I will have to connect this voucher or this paper with the testimony of the man who made it, probably the bookkeeper. It looks like his handwriting. I will offer this document in evidence as identified by Mr. Gorbea on the stand, subject to further being connected up by the man who made the voucher, so as to explain it as an authentic document.

Mr. Brown: Unless he made those entries, he cannot prove it sufficiently for it to be introduced in evidence.

Mr. Travieso: I just want to have it identified by Mr. Gorbea as being the same document he used, and then I can further connect it with other testimony.

The Court: Yes, he can testify it is a document which he used in his examination.

The Witness: I did find an entry in the inventory book corresponding to that voucher; here is the inventory for merchandise, signed by the president of the corporation, Mr. Rivera Soler, dated December 31, 1931.

[Mr. Brown objects that the inventory itself has not yet been proven how it was taken, whether it is a true inventory; that counsel for defendant has not had any opportunity to examine anybody upon said inventory.

[fol. 40] After much discussion by counsel for both parties as to the purpose for which said voucher could be admitted in evidence it was finally decided by the court that the witness could testify as to the documents that he examined and what those documents show from said examination.]

Mr. Brown: Assuming that the entries are correct.

Mr. Travieso: That is what I am trying to do by the bookkeeper.

The Court: This is not the one to prove the documents.

Mr. Travieso: Of course not. Whether they are true or not, he has used them as the documents submitted to him in making his examination.

The Witness: I have finished that part of my statement; I did state that I found an entry in the inventory book corresponding to that voucher.

[Mr. Travieso offers this voucher only for the purpose of identification as one which was used by the witness for the purpose of his examination. This document was marked "Identification No. 13 for Plaintiff.]

The Witness: In this page of my report, under the heading "Inventories", I have three different items, one about which I have been testifying, raw materials for production, goods in process, and manufactured goods in stock.

That document that you are showing me is my report containing the result of my investigation of the books, vouchers, documents, which form the bookkeeping system of the plaintiff corporation, Jose Rivera Soler & Co., Inc.; this report was made by me personally, and signed and certified by me, and contains a true and exact statement of what I found in these books and vouchers.

[Mr. Travieso offers this report in evidence and Mr. Brown objects, stating that counsel for defendant has the right to cross-examine the witness as to the result of his examination. The court allows the document to be identified for the purpose of introduction, and the same is marked "Identification No. 14 for Plaintiff".

Much discussion by counsel as to the witness' testifying to explain the report made by him.]

[fol. 41] Mr. Brown: I want to make a frank statement to the court of what my grounds of objection are, so that I will not take any surprise exception. Books of account, when they are offered in evidence as to their contents, of course are generally divided into two classes, books of original entry and books like the ledger the entries in which are taken from the journals and other books of original entry. Now in order to make books of original entry admissible, and make books like ledgers admissible, for instance, it is necessary for somebody to testify who has knowledge of the facts upon which those entries are based, and, therefore, able to testify that the entries are or were correct. Otherwise the books are not admissible in evidence. Now that is what we are contending in this case, and we are contending we shall object to the admission of any of these books of

original entry, and those dependent on them, until the entries are shown to be correct by persons who know the facts.

[Counsel continue arguing.

Mr. Brown again objects as to questions based on the report of the witness Mr. Gorbea, which report is not in evidence and not admissible in evidence, because the rule is that where the witness is available he should testify and an opportunity given to cross-examine; otherwise, he could file the report and not come to court at all.

Further argument by counsel.

Mr. Travieso offers the report of the witness in evidence.]

Mr. Brown: I object.

The Court: I don't think it is admissible. The witness who made the report is here, and he has testified from the the books. I don't think the report he made, which is nothing more than a statement, would add to his sworn testimony.

Mr. Travieso: I can have either the report or his testimony as to the findings or result of his audit. I just wanted to have the whole document before the jury so that we can have all the data together.

The Court: He has stated he has made an audit of the books, and he has given the total amounts as a result of his audit. Now the report is only to show what he has just testified to. I don't think the report is admissible.

[fol. 42] Mr. Travieso: May I take an exception?

The Court: I am going to add that he may use any memoranda that he made for the purpose of refreshing his memory about any matter. If you wish him to refresh his memory from the report, he may do so.

The Witness: From my examination of the books and vouchers, as I have already testified, I am able to state to the jury whether those books represent a clear and plain and complete picture of the business transacted by the plaintiff Jose Rivera Soler & Co., Inc. They are a complete record of the business transacted by that company; here is the report showing those details.

[Answering questions propounded by members of the jury, the witness testified:]

The books show transactions from January 1st, 1931 to March 18, 1932; I also found a stock book; here are the inventories for two years, for inventories practiced on December 31, 1931 and the inventory practiced on December 31, 1930. To determine the stock on March 13th I have to take the inventory practiced on December 31, 1931, and add all the operations done for the next two and a half months; that is what I have done. They did keep a stock book, this one; this is the inventory book; these are two inventories, for two different years, 1930 and 1931.

A Juror: What I mean is a stock book, which should show the amount of merchandise on hand on the 13th of March, the day of the fire?

A. Well, that cannot be done. They have the last inventory according to the general balance.

This is the stock book, the inventory book. This is it. You can see this. I had the merchandise received and I deducted the merchandise going out.

The amount of goods on hand, the stock on hand on March 13, 1932, the day of the fire, was: raw material for production $8,442.38; goods in process, $2,524; manufacturers' goods in stock from surplus materials $5,188.38, altogether $16,152.76, the amount of the inventory; and now we have machinery and tools $13,854.28; furniture and fixtures, $3,825.49; altogether, $17,679.77 for fixed assets, machinery and furniture and fixtures. They made the inventory for the last year; that is, the year ending Decem- [fol. 43] ber 31, 1931; they had the inventory for machines and furniture and fixtures, and for stock, and so forth; and then they kept an account for each of those items, and if they go ahead and buy goods during the days of January or February, they have separate entries in the corresponding account in the general ledger. I had to start from the last inventory, the one tak... on December 31, 1931, and from that day on I had to go voucher by voucher and take all the purchases since December 31, 1931, and add to the inventory and deduct all the sales, and that is the real facts we have here up to the last day, March 13, 1932; when I say vouchers I refer to the daily entries.

Cross-examination.

By Mr. Brown:

These books seem to me to be very clearly and correctly kept; they seem to reflect clearly the whole course of the business of Rivera Soler & Co., Inc., there is nothing unusual about them at all; as regards the check book, the checks are missing; as regards the other books there is nothing unusual, nothing to attract my attention at all; in the course of my examination of the books I did not see anything that excited my attention as to those inventories for December 31, 1930 and December 31, 1931; I don't know when those entries as to those inventories were made in this inventory book, I don't know when either of them was made. I didn't know that the inventory made on December 31, 1930, as appears from the books of Rivera Soler & Co. originally showed only $800 for materials in the course of manufacture; I only saw the inventory for the last year; I don't know anything as to whether this so-called inventory as of December 31, 1931, was actually made a few days before the fire; I didn't know that it swelled the inventory that, according to these books was made on December 31, 1931, as to materials in course of manufacture, from $800 to $2,324.74; I didn't know that it increased the value of the work in process from $800 to $4,853.50.

Mr. Travieso: I object to the manner and purpose of the cross-examination.

Mr. Brown: I asked him if in the examination of the books he did not discover that.

[fol. 44] The Court: I think it is proper.

The Witness: At page 7 of the ledger is shown work in process, value; the first entry is March, 1921, $815.19; the next entry is apparently December of the same year, December 31st, $800 and then there is no entry from December 31, 1931 until February 23, 1932, when we have work in process $4,153.50; I checked these figures against the inventory; according to the inventory, they practiced that on December 31st, 1931, and they made a journal voucher for the amount; I did notice that on page 5 of this ledger, on January 1st, 1932, the materials for manufacture was given as $800; that the next entry is January 31st, where $126 is added, and then on February 29th we have materials for $2,704.83; and that is supported by the voucher,

by the voucher that says there was an inventory made on December 31, and so on.

It did not strike me as peculiar at all that, having made an inventory on December 31, 1931, in which an item appears of materials in process of manufacture, in the sum of $2,324.74, and the books on January 1st only show $800, and on January 31, 1932, it was still $800, plus $126, and then the amount that refers to the inventory of December 31, 1931, has a voucher to corroborate it, an entry of merchandise in process of manufacture of $2,704.83 as made on February 29th; when I prepared my balance I did it for fourteen months and a half, to the day of the fire; I didn't pay any attention to the profit and loss from that book; on page 27 of the ledger, as to "mercancias sobrantes", which means surplus or excess merchandise, as of December 31, 1931, $1,384; there is no further entry of sobrantes until February 23, 1932, when the amount is stated to be $3,954; I thought those figures had been checked with the inventory. I did not discover from my investigation of the books of account that according to the inventory of December 31, 1931, as originally made, the amount of the sobrantes, or excess merchandise, was $1,379, or that later, on February 29th, that inventory was changed to make it read $5,384.34.

Mr. Brown: These facts, your Honor, I am not asking this witness any questions I have any doubt about. We have an "acta" of the corporation which will verify what I am asking the witness.

[fol. 45] The Witness: I did see some of the corporate books, some of their minutes; I understand that part of the business of plaintiff corporation was done on a basis of material furnished by concerns outside of Puerto Rico; they sent the material from outside to Soler & Co. and Soler & Co. manufactured it; this was done upon an agreed price, a given price; what should be paid for cost of manufacture; I don't know whether Jose Rivera Soler & Company did any manufacturing on its own behalf; I believe that all of the material that was furnished them was furnished by these people for whom they manufactured; they sent the material out to different parts of the island to be manufactured, outside of the office in Santurce; they had agents in the island; sometimes this material was hand work and sometimes machine work; they kept a record

where they showed all the material sent out to different parts of the island; the record shows who took the material, it shows what materials were returned and when; I think it does show such facts; the documents or the books having to do with the Handcraft Import Company, which witness this morning testified was the biggest single customer of Rivera Soler & Company, are contained in those loose sheets, Exhibit No. 9.

I cannot tell by looking at those sheets how much merchandise the Handcraft Company should have had in the factory on the date of the fire; I would have to take a pencil and figure it out; it would take one or two days to check all those items; I received a letter about the account from these people and Mr. Soler showed me a letter about the last items from these people, so I didn't think it was necessary to check this account then; when I had the right figure there was no use to check item by item; I didn't check the account of Madeira Linen Importing Company, it is in the book I guess; if the account is in the book I checked it, I don't remember the name now; I remember Greenberg and Bloch and others; I did check their accounts in the book; I checked the total of the account of the Handcraft Import Company; I mean the last balance according to the books; I checked this last balance against the account current book; I can't tell how much they had in the factory because I don't know what goods were in the factory; the letter that I have mentioned was about the statement of their account to the last day; as far as I [fol. 46] interpret the books I don't know what there was in the factory on the date of the fire; I don't know how much was out on the island; I don't know what it was worth; I don't know whether the valuations given in the books are correct, whether they are accurate or inaccurate.

Mr. Rafael Wolfe, a witness previously called on behalf of the plaintiff, was recalled, and under the same oath as before, testified as follows:

Direct examination.

By Mr. Travieso:

I testified this morning that I was the bookkeeper of Jose Rivera Soler & Company, Inc., the plaintiff in this

case; the book shown to me is an inventory book of Jose Rivera Soler & Company, Inc.; the handwriting on the pages of that book containing the two inventories is my handwriting; they were written by me; on page 2 of the book appears what is called a general inventory made on the 31st of December, 1930, which was made by me together with Jose Rivera Soler; I made that inventory with Jose Rivera Soler personally, item by item; if there were twenty Singer machines, we checked them up machine by machine, I mean that I counted the articles in every one of those items myself; that inventory was made on the 31st day of December, 1930; the general inventory appearing on page 4 of that same book, made on December 31, 1931 was also made by myself together with Jose Rivera Soler; we followed the same process as in 1930, item by item; every one of the items appearing in this inventory and also in the previous one for 1930 was counted by me personally; those articles and those machines were there at the time these inventories were made; the last time that I was in the factory of Rivera Soler & Co., was on the 12th of March, 1932, the day before the fire, on which date I was still in the employ of Rivera Soler & Company, Inc., as bookkeeper; on the day before the fire I left the factory about two-thirty or three P. M.; at that time when I left the factory there were in said factory all the machines and apparatus that are specified in those two inventories; none of that property was removed from the place before the fire; the last inventory is dated December 31, 1931; none of the property, machines, motors and fix-
[fol. 47] tures and so forth was removed or changed from the factory between that date of December 31, 1931 and March 13, 1932, the date of the fire; no merchandise belonging to Rivera Soler & Company and specified in the inventory was removed from the place; on the 12th of March, 1932 the factory was operating normally; at that time around a hundred and fifty operators, upstairs and downstairs, were working in the factory; it was a two-story building and I remember now that downstairs the work was going on complete; the factory was in normal operation; the full force, the capacity of the plant in number of employees was more than a hundred.

[Mr. Travieso offers the inventory book in evidence for what it shows, without any limitation, but before passing

upon this motion for introduction the court allows Mr. Brown a special cross-examination of the witness.]

Special cross-examination.

By Mr. Brown:

The Witness: All the entries contained in this book Exhibit No. 4 are in my own handwriting; I made these entries in the book on December 31, 1930 and December 31, 1931; I made those entries each time we made up an inventory; I am sure that I actually made these entries in this book on December 31, 1930 and December 31, 1931; making those entries took some time; I made them on those dates, December 31, 1930 and December 31, 1931; I made those entries on the same day, no part of that was done in February, 1932; I had been working with Jose Rivera Soler for over three years, all of which time I was a bookkeeper; I did not make an inventory in 1929 nor in 1928; I started in 1930; I don't remember now when I got that book; that book must have been bought in the store of Cantero, Fernandez or some other book store; all of the articles represented by the various items of machinery and merchandise detailed in the inventory that appears dated December 31, 1931 were on both floors, on both the upper and lower floors; it was a two-story building with a basement; the machinery was on the upper floor, the second floor; all the machinery was on that floor; the merchandise was downstairs and some upstairs; what the workers were working with was on the second floor; the merchandise was kept on the first [fol. 48] floor on shelves and in boxes, in small boxes; the first floor was one big room and the second floor was also one big room.

When I was making the inventory I took those articles down from the shelves and right there we made a note of them; it took me about three or four hours to make the inventory of December 31, 1931; in the morning; I was working that day and there were times when I worked there on Sunday also; the operators were working there that day; there was merchandise on the second floor, the merchandise that was being elaborated; they were working on some of the material that I inventoried; there were odd lots of cloth there, there was quite a bit of material out; quite a bit of cloth part of which had been used, and under-

neath the table also there were rolls of cloth; Rivera Soler and myself put the prices on these various articles in this inventory, prices prevailing in the market at that time; before making the inventory we knew the merchandise that was there and the price of it, Rivera Soler and I were familiar with that and knew the prices; this inventory was made in the morning on the 31st day of December, 1931; we started a little after eight o'clock in the morning, about eight-thirty and finished about noon; the spools of thread come in cases and you don't have to count them spool by spool, we simply had to open a case to see if it was complete; we didn't have to take them out and actually count them; we opened all the boxes; we counted all of the children's dresses and weighed anything that was necessary to be weighed; we measured the broad cloth and other cloth on hand, using the yard stick as far as odd pieces was concerned, because when there is a complete roll we know the number of yards it contains, because it is marked with the number of yards; it is unnecessary to unroll it to find out by measuring.

[The book offered by Mr. Travieso in evidence is admitted and marked with the same exhibit number it already had.]

Direct examination.

By Mr. Travieso resumed:

The book that you are showing me, Exhibit 5 for plaintiff, is the current account book, which was kept by me; the entries in that book from 1930 to 1931 are in my own handwriting; those are the two years covered by the two inventories; the entries were made in the regular course of [fol. 49] business of the company; I did not make any entries in that book on dates different from the dates appearing for each one of the items in that book.

[Mr. Travieso offers this book in evidence.]

Special cross-examination.

By Mr. Brown:

All the entries made by me in that book were made on the same date as shown, and in accordance with the invoices received, and in accordance with the invoices for

the merchandise which was shipped to the United States; I would personally make these invoices when the shipments were made to the States; as to the merchandise that arrived the invoices came from the United States, from the various business houses that sent us the merchandise; sometimes I received the mail and took out the invoices and other times Mr. Rivera Soler; sometimes I examined the invoiced goods and checked as to the amounts and other times Mr. Rivera Soler did that; as to the shipments made to the United States, sometimes Rivera Soler and I would check them, and other times the cutter who worked there, Teodoro Rodriguez, would do that if I was not there; if I was in San Juan, for instance, doing something, Mr. Rivera Soler would check that up with the cutter, and when I came back I would make up the bills for the United States. When entries were made of invoices those invoices were for merchandise received; there are also entries in that book for merchandise coming in and going out; in each case there was an invoice; if an invoice came in connection with some suits or dresses that were sent from the States to Rivera Soler & Company, in some cases, that was always checked up by Mr. Rivera Soler and Mr. Teodoro Rodriguez; occasionally I checked those; many times I would check them when I had time or when Mr. Rivera Soler wasn't there.

In the vouchers the invoice covering every entry appears; all the entries that appear in that book may be referring to invoice numbers on different dates; there is specified the number of the voucher, and to that voucher the invoices are attached; I would not have to go to the vouchers in order to find out how much material or how many dresses or suits came into the factory; I would look for it by check- [fol. 50] ing the merchandise itself; if there are ten dozen suits we know how much material has been used on them, and we can check on what is still there; some of those entries I was able to verify because I personally examined them, and others were examined and only Mr. Soler and somebody else had knowledge of the facts; I got my information from them.

[Answering a question by Mr. Travieso the witness testified.]

In those cases where the checking was done by Mr. Rivera Soler, the president of the company, or by anyone else, they

made a written memorandum of what they had counted or checked; they had to do it, to enable me to make up an invoice to send to the United States.

[Mr. Travieso offers the book in evidence and the same is admitted and marked for all purposes.

The court adjourns until next day at 9 o'clock (May 8, 1934).]

Direct examination.

By Mr. Travieso resumed:

The book that you are showing me, Exhibit 1 for the plaintiff, is the ledger of Jose Rivera Soler & Co., which was kept by me and the entries made in the same are in my own handwriting; that book is one of the system of bookkeeping of the plaintiff corporation.

[Mr. Travieso offers the book in evidence and the same is admitted.]

The Witness: That book that you are showing me, Exhibit 6 for the plaintiff, was also kept by me; it is the agents' book, the agents to whom we sent out merchandise and from whom we also received merchandise; the entries in that book are all of them made by me and it belongs to the system of bookkeeping of the plaintiff corporation.

[The book is offered in evidence and admitted for all purposes.]

The Witness: The book that you are showing me is the voucher register, where vouchers were entered and the amounts of which were transferred to the ledger monthly; that is to say, this is a history of the transactions carried on by the business; carried on by Rivera Soler & Company, and that book was kept by myself; the entries in that book [fol. 51] are in my own handwriting, latterly; those entries were made on the same date indicated in the book; I got the information to make each and every one of those entries appearing in that book from the voucher register, from the vouchers themselves; I would enter the vouchers in that book daily and monthly, the amounts were posted to the ledger; each one of those entries contains a refer-

ence to the number of the voucher to which the entry refers; the vouchers are in the files of the corporation from one year back; they were kept for a year back and there are vouchers on hand for one year back of the date of the fire; the vouchers are there and I could give the numbers; I believe they began on this date [indicating]; the company has vouchers backing or corroborating those entries in the book from January 1st, 1931, on; every one of those entries has a supporting voucher which is in the files and each voucher has its supporting document; these entries were made, for instance, here on the 25th of January we have a column showing the number of the voucher; for example, the voucher No. 723 appears here, this goes to the credit and debit of the book; and that voucher was kept in the files of the company.

The book that you are showing me marked "Exhibit No. 2 for Plaintiff" is a petty cash book; this record of the petty cash was carried on by the wife of Mr. Rivera Soler; she kept track of the petty cash and in accordance with the cash she had on hand she would make the entries in this cash book; it was not necessary to enter any vouchers here; it was only memoranda of small cash payments over the counter; for instance, for express deliveries, she would pay the cash for that expense over the counter, rather than make a check for the payment; then I made the entry. The entries in that book are in my own handwriting; I would check up each item before entering it in the book.

Mr. Travieso: I offer this in evidence. Mr. Brown makes no objection on the understanding that Mr. Rivera Soler shall testify as to the accuracy of the information that he gave to the witness as a basis for the entries in the books.

The Witness: The notebook marked "Exhibit No. 7 for Plaintiff" that you are showing me is a resume of admin-
[fol. 52] istration and general expenses which I carried on for the purpose of being able to tell as to the administration and general expenses, which account comprised, for instance, miscellaneous expenses, travelling expenses, cables, telegrams and telephone and so forth; this notebook is a part of the accounting system of Rivera Soler & Company, Inc., and was kept by me; the entries made in that book are in my own handwriting; I got the necessary information to make the entries appearing in that book from the vouchers themselves, and some of them from the checks

that were paid and others from the petty cash, and so on; this is a resume of the account of administration and general expenses; the sources of my information were, first, vouchers, and second, vouchers, and also petty cash; the check book was kept by me and the bank account also, from which bank account I got information for making some of these entries, very few of them; the other entries are based on vouchers; the vouchers I refer to are the same vouchers that appear in the voucher file of the corporation.

[The book is offered and admitted in evidence for all purposes.]

The book that you are showing me marked "Exhibit No. 8 for Plaintiff" is the stub of the check book of Rivera Soler & Company in the Royal Bank of Canada and it was kept by me; all the entries in the stubs are in my own handwriting.

[This book is offered and admitted in evidence for all purposes.]

The nine sheets or pages marked "Exhibit No. 12 for Plaintiff" that you are showing me are a current account which we carried on with the Royal Bank of Canada; as the checks were burned in the fire, every time the office of Mr. Hastrup, the adjuster, would ask us for any voucher or proof we would get it for him; that is what happens in this case; we didn't have the checks because they were burned, and we asked the bank to furnish us with this statement, then the Royal Bank of Canada sent us this certified statement, which was checked by Mr. Gorbea, the accountant who testified here yesterday.

[Mr. Travieso offers this Exhibit No. 12 in evidence and the same is admitted for all purposes.]

The book that you are showing me, marked "Exhibit No. 10 for Plaintiff", was kept by me and is the book in which [fol. 53] we entered the merchandise received from the United States consigned to Rivera Soler & Company; the entries in that book were all of them made by me on the dates indicated in the book in each case; all the dates appearing therein are the dates of invoices; all the merchandise entered in this book was actually delivered to the company and it was all received by the company; I ob-

tained the information to make the entries in that book from the invoices sent to us by the houses in the United States; we received the merchandise together with the invoice, and checked the merchandise, and if it was in accordance with the invoice we would make the entries in the book.

[Mr. Brown asks for leave to make a question and the witness testified:]

Sometimes I would examine the goods and other times Mr. Rivera Soler, and other times, when I was not there, Mr. Teodoro Rodriguez, the cutter, would examine them.

[Mr. Brown makes no objection to the admission of this document in evidence, subject to Mr. Rivera testifying as to his checking up of the merchandise received with the invoices.

The document is admitted for all purposes.]

The 295 folios or pages which you are showing me, marked "Exhibit No. 9 for Plaintiff", constitute an account current book of merchandise only received from and shipped to the Handcraft Import Company, Inc.; I got the information for every one of these entries from invoices which they sent to us from the United States from the house of the Handcraft Import Company, Inc.; all invoices received by the corporation were checked with the books themselves before making any entries in this book; sometimes they were checked by me and sometimes by Mr. Rivera Soler or by other responsible employees; in every case I satisfied myself before making the entry that it was a correct entry; absolutely all those entries are in my handwriting.

I remember that this Handcraft book was afterwards checked up by me with Mr. Steffens, and it was all found to be correct; Mr. Steffens works with the insurance company and the Handcraft Company confided the work of checking this account to him; Mr. Steffens and I checked [fol. 54] together this account and he found it correct; he had a list of merchandise that the Handcraft had sent to us; in accordance with that list of merchandise we checked up style by style the merchandise sent to us by them, as well as the goods sent to us by the Handcraft Import Company; of course, there were several occasions when we sent merchandise to the Handcraft, which we can

prove by vouchers that we have from the same house; for example, style number so and so, we might send in two and a half dozens, and there were times when they would receive two dozens and nine pieces, and they would give us credit for the difference in the merchandise, and immediately by that same invoice we would arrange our invoices and make the corresponding entry in their book; this book contains a complete history of the negotiations between the Handcraft Import Company and Jose Rivera Soler & Co., Inc., as to merchandise only.

[The book is offered and admitted in evidence for all purposes.]

The fifteen pages that you are showing me are a statement of the movement of cash of the firm of Rivera Soler & Company with relation to the money we had on deposit there with the Banco Comercial; it is the record of the checking account; it is an account of the monthly statements rendered by the bank to the corporation; this is a copy made up and sent to us by the Banco Comercial de Puerto Rico; it was requested from us by the insurance company and we immediately asked for it from the Banco Comercial and they sent this statement; all of those accounts were checked; it was also checked by Mr. Gorbea, the accountant; I did not check them myself; the filing cases that you are showing me contain the vouchers or journal vouchers that were made by the corporation of all the invoices received as well as the shipments made to all houses in the United States with which the corporation did business; that is to say, through this book all of the operations of the company were recorded.

Those are the vouchers from which I got the necessary information for the entries that I made in the books; nearly every one of those vouchers has its supporting documents; there is one of each principal account, for which the voucher [fol. 55] required supporting document; those files were kept by me and they have been in my possession; these vouchers were sent to the insurance company in support of the claim for indemnity; we sent everything to the insurance company that they asked for; the insurance company, for instance, would ask for certain invoices, and we would offer them all to them, but Mr. Hastrup would ask for certified invoices; if he had wanted them we would have taken

them out of this register of vouchers, but he would not accept that, and we had to request, for him, from all of these houses certified copies of all the invoices of goods that we had received; some of them were sent to us and others remained in the possession of the insurance company; in every case where the insurance company wanted a certification of a particular invoice I got the certificate and handed it to the insurance company; these vouchers have been in my possession since they were returned to me, as bookkeeper, by the insurance company; those other four cases also contain invoices; five cases altogether containing vouchers and invoices which corroborate the entries in the books of account.

[The five filing cases are offered in evidence, admitted and marked "Exhibits No. 13a to 13e for Plaintiff".]

Every time that we sent invoices, for instance, to this house of Handcraft Import Company, they would send us this report or invoice sheet that you are showing me, in which they say "correct your records as reported below"; in that way the copy of the invoice that we sent to them, upon receipt of this report, would be corrected by us. For instance, we have one report showing that although in our invoice No. 391 we sent them on March 3, 1932 eleven dozen and four pieces of style 3507, nevertheless they received up there eleven dozen and ten pieces, an overage of seven pieces; this is an error made by the employee who packed the merchandise; immediately we would correct our invoice accordingly, and they would credit us here the 30 cents difference; those pages of account were for the purpose of checking and correcting possible mistakes in the shipment and delivery of merchandise; those reports were received by me and kept by me; all of the corrections were made by me.

[Mr. Travieso offers said statement of the account of the [fol. 56] Handcraft Import Company with the plaintiff corporation in evidence and the same is admitted and marked "Exhibit No. 14 for Plaintiff".]

Cross-examination.

By Mr. Brown:

I am very thoroughly acquainted with the business of Jose Rivera Soler & Company, Inc.; I had been with that

corporation two or three years, I think; before that I was employed in the Farmacia Sojo, Inc., for about four or five years, and I was manager and bookkeeper of the corporation; between the time that I left Sojo & Company and the time I became employed with Rivera Soler & Company I was working on personal business of my own; I cannot remember exactly the date on which I commenced to work for Rivera Soler & Company; I believe it was in the year 1930; in the first part of the year 1930; I am pretty sure about that; that was my first connection with Soler & Company; from the time that I commenced working for Rivera Soler & Company in 1930 I continued working in that employment until the present time; during that time Rivera Soler & Company's business was needle work; the business of Rivera Soler & Company consisted of manufacturing goods that were sent to the corporation by dealers in the United States, and also of work done by the corporation itself here in the island; it did work for itself here, such as pajamas and children's suits; those were articles that were not sent to the United States, business that Rivera Soler & Company did on its own account, and it sold these goods locally; in those cases Rivera Soler & Company would buy the material and manufacture those goods; "payasos" are creepers; "tops" are blouses; "cuill covers" are table cloths and blouses are "blusas"; merchandise is called "mercaderias" in Spanish; "materiales de elaboración" means sewing thread and embroidery thread, and boxes as well.

We carry on in the ledger two different accounts, one materials for manufacture, which I have just mentioned, and the other is the goods on hand, such as pillow cases, children's suits, creepers, table cloths, linen cloths and all those articles that are listed in this inventory; under merchandise there appear 880 yards of linen cloth, 1600 yards of broad cloth and 2400 yards of mixed cloth, various kinds [fol. 57] of material; that material was not intended to be made up in clothing; that was cloth that was overage, or remnants, on amounts of material sent to us from the States; as to this I am not very expert, but I can tell you what Mr. Rivera Soler has explained to me in regard to it; we had a house, for example, the house of Maderia, for whom we did work; they would send us, for example, a certain number of yards of cloth. When the houses send

merchandise down to be elaborated, there is always a certain percentage, I don't remember the exact percentage, but three or four percent, or something like that, which is considered as waste; now an expert cutter who cuts that cloth may be able to economize and save quite an amount of that; Mr. Rivera Soler and myself would make our calculations and if they would send a thousand dozen sheets, or a thousand dozen pillow cases, we would cut up the pillow cases or sheets here by the dozen and the material that was over would belong to the corporation; sometimes we would have pillow cases and other times the cloth itself, as overage.

The five thousand yards of cloth with a value of something over eleven or twelve hundred dollars is the balance of overages or remnants, from many houses, and this system is not carried out by all the houses either, but some of them only; for example, we have the house of Bloch who did not send us the cloth to be cut, but they would send us the suits already cut and they were to be made up here, and we had to make complete returns to them, and if we received 500 dozens from them we had to return that number to them; but it was not so with some of the other houses that would send us the cloth to be cut here; the houses that sent us cloth instead of sending the suits already cut were the Maderia Line Importing Company, Morris Greenberg, and R. Shama; I don't remember if there were others, but I think not; among the things that remained over and above were 97 dozen pillow cases, on December 31st, and 132 dozen children's suits, thirty dozen creepers, forty dozen children's suits, forty dozen assorted table cloths and 155 dozen assorted towels, all of which items aggregate $5,340,45; I don't remember the profits of the concern for the year 1931, that can be seen from the books.

X Q. 1. Well, these overages at five thousand and some-
[fol. 58] thing would approximately be worth twice the entire profit made by the concern in the year; isn't that so?

A. I don't know as to that. I would have to see the books to answer that question.

All of the articles of merchandise that are set out in the inventory, pillow cases, children's suits, hundreds of yards of broadcloth and linen and other cloth were all there on December 31st, they were all checked up by myself; I know

that that is exact; that merchandise was there; the greater part of it remained there at the time of the fire; some of it, of course, had been sold; I remember having made that return of Rivera Soler & Company showing the property of that company as of January 15, 1932, in which it is stated that the total of merchandise was $800; this was $800 worth of merchandise in process of manufacture: it is not with reference to the merchandise on hand.

X Q. 2. Well, where is the merchandise then that was worth five thousand and some dollars, that you are talking about? Did you forget about that?

A. No. I am looking this over. It is some time since this was made up, and I forget the details of it. What we put in here was the $800 of merchandise in process of manufacture.

I don't remember the exact amounts for taxable property of Rivera Soler & Company, merchandise or mercaderias, furniture; the amounts of $14,743.38 for machinery and a total of $20,032 for taxable property refer to December 31st, 1931; that is a return made in April, 1932, but which refers to the books up to the 31st of December, 1931; the property that was supposed to be their taxable property on January 15, 1932, that is, fifteen days later; it seems to me that there is no item in the return calling for a statement as to raw materials; here what is indicated is what is to be paid for materials on hand, and machinery and furniture and fixtures; the others, as they were not items in the business they were not included; I didn't think they were subject to taxation; for instance, here are mentioned on the list cows; we have no cows; the $800 that I put in were for work in process of manufacture in the island; that is an estimate of what was around the island in process of elaboration; that was in April of 1932; these books of the corporation were in the office of Mr. Hastrup; I had seen the proof of claim presented by the [fol. 59] company and I know what it contained; the proof of claim was based on that inventory.

X Q. 3. Now, did you read the oath that you took on making this tax declaration?

A. Yes, sir.

X Q. 4. It reads: "I, Rafael Wolf, secretary of Jose Rivera Soler & Company, Inc., being duly sworn, say that

to the best of my knowledge, information and belief the foregoing statement and those in the attached Exhibits Nos. 1, 2, 3, 4 and 5 (which in this case were not attached; there were no attached exhibits) contains a full and true and complete list of all property held by or belonging to the aforesaid Jose Rivera Soler & Company, Inc., in the Island of Puerto Rico, on the 15th of January, 1932, and that all such property has been fully and fairly described and its true condition and value represented, and that all interrogatories relating thereto have been fully and truthfully answered, and that I have in no case sought to mislead as to the quantity or quality of such property.". Now in this tax return the value of the machinery or movable machinery is given as $14,743.38. That corresponds to the inventory, doesn't it?

A. Here in the inventory we have $14,727.10. We paid too much tax.

The Witness: I don't remember that the net profits during the last year 1931 were $471; I cannot say whether that was true or not; when that return was made the books were in the office of Mr. Hastrup, it seems to me.

Mr. Berrios Berdecia was the treasurer of the corporation; the letter shown to me, dated April 8, 1932, and signed by Mr. Berrios Berdecia, was made out in the month of April; I don't know the exact date; these books were taken to the office of Mr. Hastrup and they could not be there before they had been delivered by Mr. Berrios Berdecia; this return sworn to by me was sworn to on the 6th of April, 1932; that's why I say it was in the month of April, but I don't remember the exact date when the books, some of the books, were sent to the office of Mr. Hastrup.

[Mr. Brown asks that the certified copy of the tax return that he had shown to the witness be marked for identification and the same is marked "Identification No. 1, Defendant".

[fol. 60] Answering questions propounded by the court, the witness testified:]

I did not make the tax return without looking at the books, I think I made it out according to the books, but I didn't remember exactly the date when I sent the books to Mr. Hastrup; in making this inventory on December 31st, 1931 I valued the articles inventoried as of their value in

the market at that time; Mr. Rivera Soler would give me the prices; he was better acquainted with those prices than I. I am unable to say whether the machinery was ever depreciated on the books; it is customary, in making inventories, to depreciate machinery in a factory that is used over a period of years, according to laws of value, due to use of wear and tear. Mr. Gorbea made a depreciation, but I don't know if Mr. Rivera Soler, on giving me the value of of the machinery when I was making up the inventory, took into account any depreciation in the total amounts which he gave me.

X Q. 5. All right. Supposing you look into the books and find out and show us in the books when this machinery first appears to be entered, and let us find out also according to the books who this machinery was purchased from? You can step down and take the books and see if you can find that.

A. The inventory was made up in accordance with the prices furnished me by Mr. Rivera Soler.

The Witness: I made all the entries, but I am not sure if the prices he gave me took into account any depreciation; every item that is entered in those books since the time that I started with the company in the early part of 1930 is made by me; all those entries were made on the date, more or less, that appears in the books; the entry dated March 4, 1929, on the ledger is in my handwriting.

X Q. 6. Did you make that entry on the date about a year before you became employed by Rivera Soler & Company?

A. No, sir.

X Q. 7. Then you are mistaken in saying that these entries were made simultaneously on the dates indicated?

A. It seems that in 1929 this company was incorporated. Mr. Rivera Soler, I don't know what employee, but he called one Luis Garcia, it seems to me that was his name, and they began to work on the books, but Mr. Rivera Soler told me that there always existed differences in the books [fol. 61] from the very beginning, and inasmuch as the journal voucher register was taken by me as correct I opened the ledger as of the date of 1929.

X Q. 8. I see. Then it is not true that these entries in the ledger were made by you simultaneously, or on the dates that appear there?

A. No. Here it mentioned March 4, 1929, and voucher No. 5 was the same voucher that was in the register of vouchers.

The Witness: I did not make that entry in March, 1929; I posted it from the journal voucher register; all the entries made in the book Exhibit No. 5 are in my own handwriting since 1930; there are entries that were not made by me.

[Argument by counsel and by the court.]

The Witness: As to whether any entries that appear in these books in my handwriting that are dated the year 1929 were taken from some other books or some other place, all the books that are here, and the vouchers; naturally, if I have an entry dated in 1929 that doesn't mean that I began to work there at that time, or that I made the entry on that date. I am familiar with all those books, I carried them myself. Here is an entry: $3,286.50; machinery and accessories for shop, March 1st, 1929, voucher No. 1; the first entry regarding machinery that appears in the book is entry at page 1 of Exhibit 3, made on March 1, 1929, that gives the value of the machinery as $3,286.50; that is when the business first started; that entry refers to voucher No. 1, which voucher should show who that machinery was purchased from; we haven't got that voucher here, we only have the vouchers from December 31, or January 1, 1931; as to whether the books anywhere show who this machinery was purchsed from, here it says: "Capital Account, Assets of the firm of J. Rivera Soler, $6,000"; and here we have, "J. Rivera Soler, Personal Account, Cash 1928-1929, $1,507.36"; I am unable to explain that; I think Mr. Rivera Soler can explain that better than I.

I can trace the entries for machinery better from the ledger; here in the ledger under date of July 31, 1930, here we have the corresponding entry; that entry appears at page 25 of Exhibit No. 3, machinery and shop accessories; that is credited to account current; I think I made that entry myself, and it seems to me that was from the house of the Handcraft Company; the entry says: "Credited to [fol. 62] Handcraft, Inc., by voucher 432, invoice of goods which was not forwarded"; it seems to me that that was a machine and other accessories because that is why I charge to them $197.50, and the difference between $215.76 and that

amount is represented by raw materials, $9.75, and which were charged to production, and $8.51, which was for freight, or rather charges in forwarding the machinery. The entry dated December 31, 1930, Dolcey, Inc., $1,283.11 was machinery in that amount, shop accessories; it was machinery received from Dolcey, Inc., which was sold to Mr. Rivera Soler; we charged it to machinery, furnishings and fixtures, and so on, and it was all credited to the account of Rivera Soler; this was machinery sold personally to Mr. Rivera Soler by Dolcey & Company, which afterwards entered into the corporation.

I don't remember at the moment when did Mr. Rivera Soler buy these machines, but the entries should be in these books somewhere; as to how much machinery altogether appears in that account as coming from Dolcey, Inc., or what the value is altogether, I don't remember, but I can see the entry. The entry appearing in the ledger, for machinery purchased from Dolcey, Inc., December 15, 1930, $140, that is one invoice sent by Dolcey; those entries, December 31, 1930, $1,283.11, and March 20, 1931, $2,253.68, represent machinery that was purchased by Mr. Rivera Soler from Dolcey, Inc., and then sold by him to the corporation. I didn't have anything to do with that machinery; Mr. Rivera would tell me: I have received this machinery from Dolcey; on my trip to the United States I ordered this; make the corresponding entries; that is not all the machinery that is stated to be on deposit with Rivera Soler & Co. in the entry on March, 1929, because here in 1930 we have $3,286.50, and then on the 31st of December there is another batch of machinery arrived in the value of $1,382.11, so that it is not the same.

I think there was some machinery that arrived from Dolcey in December, 1930; as to whether there was machinery that came from Dolcey in March, 1931, the invoice arrived; I think some machinery came from Dolcey since it is entered in the books. I did say that when I made these entries in the books I went and saw the machinery or anything else that was brought in and that I checked it up [fol. 63] first, but when Mr. Rivera Soler came to me, as president of the company, and told me to make the entry, I must, of course, understand that machinery was received; much of that machinery I would see, but other machinery I would not, I might be out in San Juan or out on the island.

As to whether the books of the corporation Rivera Soler & Co., Inc., show that there was a chattel mortgage on machinery sold by Dolcey, given by the corporation Rivera Soler & Company, that is the same machinery that was sent by Dolcey to Rivera Soler & Co., here we have the invoice from Dolcey; you can see here that Dolcey sold, according to this invoice, on January 14, 1931, to Jose Rivera Soler personally, the following machinery, and it is detailed; the date of this invoice is January 14, 1931, and it is directed to Jose Rivera Soler individually and not to the corporation; that invoice says: 1-2413, at $34; 26-9610 machines at $51, $1,339; 26 spaces double turn table or power tables, with pully belting complete, at $19.50 each, so much, and a number of other items, transmitter, spool stands, and general electric motor, 3 H. P., one phase, $146, which totals $2,253.68. Mr. Rivera Soler sold that machinery to the corporation for the same amount; it was sold for $2,253.68.

As to how did the company pay for that machinery, the machinery and shop accessories were sold by Dolcey to Soler for $2,253.58; now, I don't know what business Rivera Soler had made with the house of Dolcey when Mr. Rivera Soler told me to credit $1,400 only to Dolcey, that is, to pay Dolcey $1,400; that can be explained by Mr. Rivera Soler; and in his personal account current I credited to him the difference; as to the big item of July 13, 1931, $7,522.43, here we have the note of that; this information shows that this machinery was purchased from Escudero, Valluveras and Pumarada, who entered into the business with $2,000 between the three of them; then it is stated that Jose Rivera Soler brings into the business machinery in the amount of $7,869.92, machinery and furniture and fixtures; then the detail attached to the memorandum says: "Statement of machinery, equipment and accessories contributed by J. Rivera Soler, personally, and by Escudero, Valluveras and Pumarada, upon the latter three becoming [fol. 64] stockholders." All that machinery did not belong to Escudero and the other two gentlemen before entering the corporation; when they came into the business they put $2,000 into the business.

I don't know if part of that was in the form of machinery; at that time they brought some machinery into the business, but it is not part of the machinery that is mentioned in that list; none of the machinery that they brought

in is in that list; all of that machinery is the machinery that Mr. Rivera Soler got; I don't know where he got it or whether it was new machinery, nor what it cost him; I think Escudero, Valluveras and Pumarada had the machinery and place of business in the same building in which we established our business and Rivera Soler brought his new machinery to this new place; as to the entries for merchandise that appear having been made in the month of February, 1932, I would have to look for them; here is the first entry, on February 23d, purchased from Jose Rivera Soler merchandise to the value of $2,524.74, according to voucher No. 1366; this is something that Mr. Rivera Soler sold to the corporation; here is the note of what he sold: 80 kilos of embroidery thread at $10, $800; 800 dozens of sewing thread of 200 yards each, at 35 cents, $280; 300 pounds of embroidery thread at $2.75, $825; 400 cones of sewing thread at eighty cents, $320; 85 pounds of silk yarn (glocilla) at $3.52 pound, $299.74, making a total of $2,524.74; I don't know where Mr. Rivera Soler obtained that thread and embroidery thread and so on that he sold to the corporation on that date; I don't know whether he ever sold any thread to the corporation before that, I don't remember now.

That is not the same thread or the same articles that I have in the inventory as of December 31, 1931, under raw materials; between December 31st and February 23, 1932, the corporation must have used part of the 1600 dozen of thread that appeared in the inventory and part of the 36 kilos of embroidery thread; this is not the same thread because that is December 31st and this is in February, the latter part of February; on February 29, 1932, there appears spool cotton bought of Sucesores de Blanes, $152.13; according to the memorandum for that entry, it represents 6,400 yards of yarn, and the next invoice is for 9,900 yards [fol. 65] of yarn and thread of different classes; the next invoice is 6,400 yards of different kinds of thread and yarn, and 20 boxes of six strand 24 silks, and one box of J. P. Coates six strand silk, and then 9,900 yards of thread; all of these invoices are for embroidery silk and thread; buff glace is thread also; it was all thread; then there is another for 6,400 yards of thread, another invoice for 13,100 yards of thread; another invoice for 3,200 yards of thread and another for 3,200 yards of thread; that was all received;

that was credited to the account of Blanes; I simply made a credit entry in the books; they owed the amount to Blanes.

Here you have another purchase in the sum of $37.96 from Morris Greenberg, $3.60, and the invoice accompanies it here; Maria Luisa Arcelay, $2.33, which is also accompanied by its invoice; Max Pollock & Co., for $22.03, and the invoice also accompanies it in the voucher. The invoice of Morris Greenberg is for ten cases of folding boxes to be used in sending them merchandise; the invoices of Maria Luisa Arcelay and Max Pollock are for thread, mainly 200 yards, 50 dozen and 80 dozen. The next purchase is that of Pedro M. Nieva; the total of the articles of this purchase is $6,314; the date on which the voucher was made was March 1st, 1932, and the invoices attached have different dates; that was because when the merchandise arrived here we had not yet received the invoices; the first of these invoices is dated February 6th, 1932, 1,400 yards silk, 42 inches, at 75 cents, $1,050; another invoice is dated February 21, 1932, for 7,800 yards of broadcloth at 17½ cents, the total price being $1,380; another invoice is dated February 27, 1932, for 3,000 yards of silk, 36 inches and 42 inches, at 75 cents, total $2,250; the remaining invoice of Pedro M. Nieva is dated February 13, 1932, for 8,207 yards broadcloth at 17½ cents, total amount being $1,436.

These various shipments or sales by Nieva were received by Rivera Soler & Company on the dates of the invoices; as to whether they arrived on the same date of the invoices I am unable to remember; I did not check these purchases as they came in against the invoices; I saw one of those shipments in Mr. Rivera Soler's car when he brought it from the island; Mr. Rivera Soler brought the silk de- [fol. 66] scribed in those invoices in his own car; the broadcloth came in a truck, but I am unable to say whether it came all at one time or on different occasions; I didn't measure either the broadcloth or the silk; the silk was of different colors and came in flat pieces in the sizes mentioned in the invoices, some 36 inch and some 42 inch; I cannot now remember how many different bales or pieces there were; I don't remember how the broadcloth came; he gave me a memorandum of the merchandise received and then I made the vouchers on the basis of the calculations he made; "he" is Rivera Soler; I credited to Nieva $6,314; here is the account in the current account.

These invoices say sold at thirty days' time; these were all sales on credit and none of them have been paid. The first that was brought in was the silk, and a laying of silk was made in order to be able to work with it, and after it was cut they started to work with it, and as it was a large quantity of silk they put the rest of it in a little room; the broadcloth was kept outside, underneath the table, in the work shop; immediately upon the receipt of this silk they commenced to cut off pieces and commenced to work on it; they were cutting the broadcloth also, and a laying was made so we could work this broadcloth and cut it out for creepers and other things; as to how many different articles had actually been manufactured out of this silk and broadcloth before the fire took place, we were working on the manufacture, but I am unable to state how many had been made.

We did not carry a stock book, there was no necessity for that; we could determine how many yards were left of any one material at the end of any one month by making an inventory; we didn't make one inventory every month but we did make one every year; I am unable to speak of 1929, but in 1930 and 1931 I personally intervened in the making of the inventories, and upon the two occasions the inventory was finished up in the morning hours, because I think that the most important thing about carrying on any corporation's work is the making of an inventory which is finished on the same day in order to be able to determine the amount of profit made by the corporation; there is no way of determining from the books how many yards of [fol. 67] material, cloth, was used in any one month, or how many yards of thread; I cannot tell what I had, for instance, a certain amount of thread on hand, and from that amount we used thread for all purposes.

There were no other purchases made from Mr. Rivera Soler between the end of December, 1931 and the date of the fire, except that of the thread, the one of $2,524.74; prior to that date the books show a purchase of machinery by the corporation from Mr. Rivera Soler, in the amount of seven thousand and odd dollars; as to whether he was paid for that, in the balance made on December 31, 1931, he had a balance in his favor of $12,695.03, that is to say, on December 31, 1931, the corporation, according to the books was owing to Mr. Rivera Soler twelve thousand and

some odd dollars for the machinery and for various payments which he had made, and for the thread purchased from him, I mean that was only for the machinery; the corporation was owing him some twelve thousand and odd dollars for the machinery, merchandise and the balance of his personal account; the date of the last purchase made from Mr. Rivera Soler before December 31, 1931, is that of July 13th, of $7,869.92; he was not paid for that, that was credited to his account; he was never paid for that; there was credited to him in the account current all the salary that he received from the corporation, and there were charged to him all the checks which were given to him.

Mr. Rivera Soler took $10,000 in stock in 1932 in payment of some balance that was claimed to be owing to him; twelve thousand and some odd dollars was given to him by the corporation in shares, one hundred shares of one hundred dollars each. Upon the receipt of goods or merchandise from continental United States I immediately noted or entered in one of the books the invoice number and amount if it was correct; it might have been entered into this account current book, or the Handcraft book or some other; I did not enter it either in the book of current account, which is Exhibit No. 5, or in the loose leaf book of the Handcraft Import Company, Exhibit No. 9, because the current account of merchandise is one thing and that carried in the account of a single house is another. The [fol. 68] stuff received from the Handcraft would be entered only in the Handcraft book; but if it was a matter of crediting for merchandise purchased in the United States it was credited in the book to the account of the house f m which it was bought.

The shipments from the houses in the United States for whom we manufactured the material that was sent to us were accompanied by invoices which were entered in this merchandise current account book of the Handcraft and in this book; the Handcraft book to which I refer is Exhibit No. 9 and the other book of which I am speaking is Exhibit No. 10; not all the other goods shipped to us for manufacture from the United States were entered in this book Exhibit No. 10, because here are some houses which were recorded in a little book like this, but which I could not find after the fire; it is a house whose name is something like Shama; this Exhibit No. 10 refers to the house of Jacob-

sen, and Henry Bloch and the Modern Vestment Company; as to where I had the receipts of merchandise from Morris Greenberg entered, Morris Greenberg's account was almost balanced, before the fire, in February or March; we owed them almost nothing.

As to where I entered the receipts from the Madeira Linen Import Company, the Madeira Linen Importing Company and another one, I think the Shamas, was the book that I could not find; I don't know where it is, whether in Mr. Hastrup's office or where; all the books we had and all the vouchers and documents we had were sent to the office of Mr. Hastrup; I have a list of all the books that I sent to the office of Mr. Hasthrup and from that list I could tell whether there is any book missing; as to where I entered the receipts of merchandise from Japanese Garment Company, that was also a book, another book, in which we carried their merchandise account; I am not sure, but I think that book must be in the office; I ought to have it in my office, I think I saw it around there; as to Shama and Bloch and the Madeira Company, Rivera Soler had very very little of their merchandise, I think.

It seems to me that I have seen that book pertaining to the Japanese Garment Company, but I am not sure. I have been confusing the Japanese Garment Company with the Japanese Trading Company, with whom we are doing [fol. 69] business now; all the documentary proof that we had we sent to Mr. Hastrup and it may be that some paper or booklet might have been left there; we hold a receipt from Mr. Hastrup detailing some of the things delivered to him, but others no; when the bookkeeper asked me for anything I would bring it to him and leave it with him without taking a receipt for it. Some of this merchandise that we received from these different firms from the United States for manufacture into clothing and table cloths or towels, etc., was sent out to be worked by different people outside of the factory, work was done in the factory and out on the island also; the account of this merchandise that was sent out to have work done on outside of the factory was carried in a book, in this book Exhibit No. 6, this is what was called regular accounts; the small accounts were paid in cash over the counter; this book, Plaintiff's Exhibit No. 6, is what I called our agents' book.

We also sent work to individuals around San Juan and other places; the work that was sent out to individuals to be done was paid for over the counter; there was a girl there by the name of Antonia Coll, and any young woman who came to her and demonstrated her ability to do the work, she would be given a dozen or so of work to be taken away; she carried a card record of that work; the person at the counter carried that on an index card, which index card disappeared; that was for very very small amounts, one dozen or half a dozen; at times quite a sum was paid for this class of work; there were times when Rivera Soler & Company had out small job lots with forty or fifty or sixty different people. In order to find out what the merchandise consisted of that was noted in this book Exhibit No. 10 one would have to refer to the invoices; this Exhibit No. 10 simply details the numbers of the invoices, the dates and the styles of the merchandise; what was received and what was shipped; Exhibit No. 10 shows what was shipped too; right here in the first entry you can see a shipment: on August 27th, 22 dozen were received of style No. 203; on August 29th—the invoice is dated on the 29th of August—there were received 24.11 dozen, and on the 6th of November 20 dozen, making a total of 66 dozen and 11 pieces, and we shipped of this amount 45 dozen 7 pieces.

[fol. 70] Now these invoices were made from the shipments that were made to them; this relation of shipments that we made to these various houses also depends upon invoices or copies of invoices that we have; I think those invoices are here; for instance, we have here the Jacobsen invoice for style 203, November 6, 1931, 20 dozen; style 203, August 29th, 22 dozen and 11 pieces; style 203, 22 dozen on August 27th, and that is the way all the invoices appear; I don't know whether the invoices to support this book No. 10 have been introduced in evidence; they are there. As to whether all of the other Jacobsen invoices to which the entries in the book Exhibit No. 10 refer have been presented in evidence, it seems to me that there are others; here is Henry Bloch, here we have also the account of Henry Bloch together with all its invoices showing the dates of shipment, number of our invoices and number of their invoices, and the dates. As to where are the copies of our own invoices of shipments that we made to Henry

Bloch and Jacobsen and those different people; for example, it says October 29, 1921, invoice No. 83; we sent them one dozen, and on the 31st of October you can look for that here among the vouchers and you will find it immediately; they are all here in evidence.

As to whether we carry accounts in the books under the headings "Furniture, Implements, Utensils in the Shop", I don't remember the name of the account exactly, but that appears in the ledger; here is the account, furniture and implements; I am showing you page 2 of Exhibit No. 1, the ledger, and the heading is "Furniture and Equipment"; to discover what these various items are it is necessary to refer to vouchers.

X Q. 9. Referring to the page of the ledger that you show me, there are several items classed as furniture and equipment, which aggregate $1,810.25. Is that right, in the year 1929?

A. No; that is the balance. The balance is $1,775.25.

The Witness: The balance for the same articles in 1931, those obtained in 1931, is $4,488.72; the last item noted in 1931 being of the 31st of August, 1931, an invoice from Sucesores de Abarca for $63; as to a considerable item under date of July 13, 1931, entitled "Various Contributions by Stockholders, $2,322.50", here we have it, this [fol. 71] item is made up, according to this voucher, of machinery, equipment and accessories contributed by Jose Rivera Soler personally and by Escudero, Pumarada and Valluveras upon the last three becoming stockholders; part of that is called equipment for the factory, and the balance is office equipment, furniture and equipment; I think that all of this equipment, this furniture and equipment, was second-hand equipment at the time that it was brought in in 1932; in 1932, according to the ledger, page 2, there are entries aggregating approximately $152.60. I don't know what was paid for the things that appear in that list purchased or acquired according to the entry of July 13th in the amount of $2,322.50; I don't know how it was paid; that was equipment contributed to the business; I think the implements, machinery and shop accessories are all there together.

The first article in the proof of claim is the printed matter and office material or supplies, $141.35, here it is; I

am showing you page 3 of the ledger Exhibit No. 1, which refers again to invoices; these articles that figure as printed matter and office material, as shown by the invoice that I am showing you, are not made up of items such as sanitary drinking cups; in administration and general expenses we have various accounts and the sanitary cups to which you refer, those are charged to miscellaneous expenses, which is under the heading of administration and general expenses, but the $7.15 to which you refer is a transfer case with index, which is worth $5.75, together with 100 folders for $2.00, as per invoice of R. Cantero & Company, and the said $7.75 were charged to the account of printed matter and office supplies; this account of printed matter and office supplies takes in our vouchers, blank vouchers, and blank books, and letter heads and account books, it does not take in typewriters; those things are not being used regularly because a book, for instance the ledger, that is a part of the assets of the company; that is worth money.

This entry that appears in March, 1931, should be March, 1932, because it coincides with the same voucher No. 1291 of March 11, 1932; that is the voucher that I just showed you. The items that I consider as printed matter in the amount of $26.25 are: stock register book, $2.50; cash book, [fol. 72] $2.00; ledger, $1.75; two journals, $3.50, and 500 invoice blanks on yellow paper—no, it is not 500, it is 3,000, letterheads 8½ by 11, with a printed heading, 500 invoices white, 500 invoices yellow, total $16.50; total of the invoice $26.25; I think all the vouchers are on yellow paper, but I don't remember; those are journal vouchers; what you show me on the yellow paper is a copy of the invoice; all our vouchers are on white paper and some of our invoices are on yellow paper; not necessarily all of them; invoices were ordered from time to time and the color was changed; those yellow invoice forms were printed here, I think R. Cantero & Company printed them sometimes, and other times at other places; maybe some of them have Real's mark; voucher No. 1174 says Real Hermanos; the later vouchers were probably printed in the house of R. Cantero & Company; on that date we had a very small amount of paper on hand and we sent out and had it printed up in the house of R. Cantero & Company of San Juan.

Redirect examination.

By Mr. Travieso:

[Answering questions propounded by Mr. Travieso the witness testified:]

The book that you are showing me is an invoice book of merchandise received from the United States and it belongs to Rivera Soler & Co., Inc., the plaintiff; it was also kept by me.

[Mr. Travieso offers this book in evidence and the same is admitted and marked "Exhibit No. 15 for Plaintiff".]

[Witness withdraws.]

Mr. F. A. C. Hastrup, a witness called on behalf of the plaintiff, after having been first duly sworn and answering questions propounded by Mr. Travieso, testified:

Direct examination.

By Mr. Travieso:

My name is F. A. C. Hastrup; I am the adjuster for the defendant insurance company in this case and I have been in charge of the adjustment of this claim; the document entitled "Petition for Indemnity", in Spanish, that you are showing me is the original application for indemnity under this policy filed by the plaintiff; it was received in [fol. 73] my office on May 23, 1932; the blank for this application was furnished by my office upon their request.

[Mr. Travieso offers this document in evidence and the same is admitted and marked "Exhibit No. 16, Plaintiff".]

After the receipt of this document, of this application for indemnity, I sent another blank to the insured; first, we agreed upon a non-waiver agreement; it is on a yellow sheet.

Mr. Travieso: I am willing to have the record show that the plaintiff and the adjuster for the insurance company signed a non-waiver agreement, whereby the plaintiff agreed that it would not take advantage of any of the acts

of the company as a waiver of any of the rights of the company.

The Witness: After signing that non-waiver agreement I required from the insured the filing of a declaration under oath; the document that you are showing me is the said declaration; it was received in my office on April 5, 1932, at 2.35 P. M.

[Mr. Travieso offers this document in evidence and the same is admitted and marked "Exhibit No. 17 for Plaintiff".]

The letter that you are showing me, dated April 5, 1932, signed by J. N. Berrios Berdecia, treasurer of Jose Rivera Soler & Company, was received in my office on April 5, 1932, at 2.35 P. M.; as to whether I received also the documents enumerated in that letter, I have to read it over; I received all of them.

[Mr. Travieso offers the said letter in evidence and the same is admitted and marked "Exhibit No. 18 for Plaintiff".]

The letter that you are showing me dated April 7, 1932, signed F. A. C. Hastrup, by Arthur R. Davila, is a letter from me to the insured; in that letter I called for a number of documents specified therein, as proof of the claim of the insured; I did not get from the insured all of the documents enumerated in that letter; their reply speaks for itself, which they sent and which they did not.

[The letter is offered and admitted in evidence and marked "Exhibit No. 19 for Plaintiff".]

This other letter that I have examined, dated April 8th, addressed to me by the plaintiff was received in my office on April 8, 1932, at 3.18 P. M.; that letter enumerates a number of documents, books and so forth that were sent [fol. 74] to me by the insured in support of the claim of the plaintiff for indemnity; I did receive the books, accounts and vouchers, etc., that are enumerated in this letter; as to whether they are the same books and vouchers and documents that have been introduced in evidence in this case, I have to see them, because I received them and returned them according to the receipt; I would have to check them up; there are more books here than I had in

my office; there are more books here now; these are the books that accompanied that letter of April 8th, 1932, received by me the same day at 3.18 P. M., Exhibits Nos. 3, 4, 5, 1, and these five boxes of vouchers, containing vouchers from No. 722 to 1314; I did find the inventories in the book; then the insured says in the letter that the bank account and the checks were destroyed by the fire, but that you might obtain a certified copy of the account from the Royal Bank of Canada; I did get that certified statement in duplicate; I think the original is in evidence here.

[Mr. Travieso offers the letter of April 8th, addressed to the adjuster by the insured, in evidence and the same is admitted and marked "Exhibit No. 20 for Plaintiff".]

The other letter signed by Mr. Davila for me, dated April 9th, addressed to the insured, is one in which I call for more books and documents; that letter was written by my office to the insured.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 21 for Plaintiff".]

The letter that you are showing me, dated April 12. [illegible] is a letter addressed by the assured to my office and was received on the same day at 2.47 P. M.; as to whether I received with the letter the document that I had called for in my letter to which that is a reply, I would have to see my answer to the letter, because this letter and the contents were not received personally by me; he must have written an answer or given a receipt; the receipt at the bottom of that carbon copy of the original letter is signed by Mr. Davila, my late employee, and it shows that the letter and the documents were received.

[Mr. Travieso offers in evidence the original and the [fol. 75] carbon copy of the above mentioned letter and the same are admitted and marked "Exhibit No. 22 for Plaintiff".]

That other letter that you are showing me, dated May 27th, is signed by me personally and addressed to the insured.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 23 for Plaintiff".]

In that letter I request the insured to send me letters, addressed to the Porto Rican Express, to the New York & Porto Rico Steamship Line, to the Bull Insular Line and to the Red D Line, authorizing me to make an examination of those companies' shipping records with reference to transactions between those companies and the plaintiff Jose Rivera Soler & Co., Inc.; this letter that you are showing me dated June 1st, addressed to me by the insured plaintiff, was received on June 2, 1932, at 9.01 A. M., on which same date were received in my office letters addressed by the plaintiff to the Porto Rican Express Company, the New York & Porto Rican Steamship Company, the Bull Insular Line and the Red D Line, but not those I asked for to the Banco Comercial and Royal Bank of Canada, for the reasons given in the letter itself.

I did get the authorization from the insured to examine the shipping records, regarding the transportation companies, in order to verify what quantities of merchandise they had received or shipped; I could not make use of those letters because the shipping companies said that I could not get access to those records; they had to appoint a special employee to look up and furnish a list, and they had no time at the moment; the plaintiff in this case did everything that it could to furnish me the means of checking their books and accounts and proofs of claim, because they had received the same answer from the steamship company, and then I suggested these letters; but I didn't meet with success; the plaintiff did not block my activities in any way, they opened their books to me and everything they had for my inspection.

[Mr. Travieso offers in evidence the letter of June 1st, 1932, addressed to Mr. Hastrup by the plaintiff, and the same is admitted and marked "Exhibit No. 24 for Plaintiff".]

The letter that you are showing me, dated June 9th, [fol. 76] 1932, addressed by me to the plaintiff, in which I call for the payrolls of the corporation for the purposes of workmen's compensation insurance, is the original letter sent by me to the plaintiff.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 25 for Plaintiff".]

The letter that you are showing me, dated June 11th, 1932, supposed to be a reply to the preceding exhibit, addressed to me by the plaintiff, was received in my office on June 13th, at 8.15 A. M., and is the original letter that I received; plaintiff states in that letter that they are enclosing a letter addressed to Mr. Carrion authorizing him to show me their payrolls for inspection; as to whether Mr. Carrion was the insurer for the plaintiff corporation, so they say in their letter; Mr. Carrion, upon my request to show me those things, said he had no detail whatever in Puerto Rico about it; he didn't say where he had the details; I could not investigate any further, because his office was the only source from which I could have gotten this information; Mr. Carrion represents an insurance company here, workmen's compensation insurance, and I represent fire insurance only, as adjuster; it was not possible for me, through the influence of the companies that I represent, to get at these payrolls that were outside of Puerto Rico; my influence does not reach that far.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 26 for Plaintiff".]

As to whether I had the book Exhibit No. 6 in my office for examination, personally I could not testify to it, because I personally did not see it; I know those because I have seen them; I just say in regard to this I personally have not examined this book; if this book was in my office it is mentioned in the letter with which it was handed to the office, and the receipt must appear on it. The receipt of the letter that you are showing me is the receipt of the plaintiff; that is not my receipt; this proves that they were returned to the plaintiff. That letter comes from my office and has been produced by me and has a receipt at the bottom where the plaintiff gives me back a receipt for the return of this book; it must have been in my office, but I didn't see it; Exhibit No. 9 called the account current of [fol. 77] the Handcraft Import Company is the one mentioned in item No. 8 of the same letter; it was mentioned in the letter, and it was in my office, and it was returned to me by the plaintiff.

As to whether the book that you are showing me is the petty cash book, I do remember that I received a letter

that they did not keep any cash book; as far as I remember they sent two bundles of petty cash vouchers, but I do not recollect seeing either the book itself or any mention of it, but, as stated before, they said they didn't keep any cash book; I had the petty cash vouchers; I do recollect that I received a letter in which they stated they had no cash book; personally I have never seen that petty cash book; it may have been in my office as the others, without my seeing it; as to that book, Exhibit No. 10, which is supposed to be where they kept the accounts with Jacobsen & Company, if you will pardon me, under item No. 7 it mentions correspondence relative to a debt to Jacobsen, but it doesn't say anything with regard to this little book; I could not state of my own knowledge whether this book was in my office with the others or not, but I might make the statement that these gentlemen did not deliver any books or other records or documents without obtaining a receipt, and we at no time returned to them such books or records except against a receipt; the check book with some stubs that you are showing me, showing the account of the plaintiff corporation with the Royal Bank of Canada, was in my office.

The little book marked "Exhibit No. 7", which is called administration and general expenses, is not mentioned in the letter and, consequently, I don't believe it has ever been in my office, unless there is a receipt for it; I don't know about it; those are the only two books, Exhibits 7 and 15, about which I am not positive whether they were in my office or not. The letter that you are showing me, signed by Mr. Davila, of my office, dated June 13th, addressed to the plaintiff corporation, in which I call for more information about the loss and the verification of the loss is the original letter which I sent to the insured.

[fol. 78] [Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 27 for Plaintiff".]

The letter that you are showing me, June 15, 1932, which appears to be the reply of the insured to my letter of the 13th of the same month, was received on June 17th, 1932; I received that letter.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 28 for Plaintiff".]

Mr. Canals is an attorney, not a legal attorney, but attorney in fact for me; the letter that you are showing me, dated June 20, 1932, addressed to the insured by my office, calling for more information, is the original letter written by me.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 29 for Plaintiff".]

The letter that you are showing me, dated July 6th, 1932, which is a reply to my letter just introduced in evidence was received the same day it is dated; that letter was received by me and produced upon your request.

[Mr. Travieso offers this letter in evidence and the same is admitted and marked "Exhibit No. 30 for Plaintiff".]

The document that you are showing me is the declaration of the mechanic Mr. Wys, which was sent to me with the last letter introduced in evidence.

[Argument by counsel.]

The Witness: The certificate of the district attorney of the District of San Juan, with reference to this fire, that you are showing me was received by me from the plaintiff on April 5, 1932; that is one of the requirements of the insurance companies, when a claim is filed, that a certificate of the authorities, the district attorney, be filed to show that there is no criminal complaint against the insured.

[Mr. Travieso offers in evidence the certificate of the District Attorney of San Juan and the same is admitted and marked "Exhibit No. 31 for Plaintiff".

Mr. Travieso offers in evidence the affidavit of Mr. Wys that has been identified by Mr. Hastrup.]

[fol. 79] Mr. Brown: I think that I will object to that, because that contains evidence testimony that may be relevant in this case. I don't think that is a document that any of Mr. Hastrup's letters called for. It was something voluntarily furnished by the insured, and as I understand that the deponent is going to testify, I don't think—

The Court: Is that a document that was called for by the adjuster? If he called for it I think it is all right, if he did not, it is not admissible.

Mr. Travieso: The document, the letter which has been marked Exhibit No. 39 for the plaintiff, calls for informa-

tion and the number of machines, their distribution, their placement in the different parts of the building, and the insured naturally thought that the man who knew more about this was the mechanic who had charge of keeping these machines in order.

The Court: Did you request a document of that kind?

A. No, sir.

Q. 1. What did your letter mean?

A. My letter was fully answered by their reply to same, but in the last part they add that they are including this certificate.

The Court: You asked for information that is contained in this document? You didn't ask for that document, but you asked for information, which information is in the document?

A. Yes, sir.

The Court: I think that is all right. I will admit it.

Mr. Brown: Will your Honor allow an exception?

Mr. Travieso: May I state, your Honor, that I am not offering the document as evidence of its contents, but simply to show compliance with the conditions of the policy in reference to the filing of complete proofs of claim.

The Court: It would not be competent as proving what it contains.

Mr. Travieso: And it is not the purpose of this and the other documents that they be submitted to the jury, nor that they be taken by the jury as to the contents of the same. I will examine the maker of the document himself, your Honor, when I get to it.

The Court: It is admitted only as a response to a letter, [fol. 80] as evidence of compliance with the request of the defendant. Gentlemen of the jury, you are not to consider that document as to what it contains, but only as being a response to a request for information.

[Document marked "Exhibit No. 32 for Plaintiff".]

The Witness: The letter that you are showing me, signed by my office and addressed to the insured, is the letter in which my office acknowledges receipt of the declaration under oath of Mr. Wys stating also that I have taken due notice of its contents.

[This letter is offered and admitted in evidence and marked "Exhibit No. 33 for Plaintiff".]

The other letter that you are showing me, dated July 8th, 1932, is a letter addressed by me to the plaintiff calling for more information; a reply to that letter I received considerably later on, subscribed by you as attorney for the insured; and that letter that I got from you as attorney for the insured gave me an ultimatum to pay or certify payment.

[This letter was offered and admitted in evidence and marked "Exhibit No. 34 for Plaintiff".]

The Court: These letters are admitted simply because they tend to show effort on the part of the plaintiff to comply with the request for information, not for what they show in themselves.

The Witness: As to whether in the reply that I had from you as attorney for the plaintiff corporation I received some information that I called for in my letter, except referring to one item of machinery there is no reply and no information given that I asked for, and no document; you refer to the books submitted already and kept by us for three months, stating that the information required by me could be found in the books; if I had been able to find it I would not have asked you for the information. The copy that you are showing me is an exact copy of the letter that I received from you.

[Mr. Travieso offers this copy in evidence and the same is admitted and marked "Exhibit No. 35 for Plaintiff".]

RAFAEL WOLF, a witness previously called on behalf of the plaintiff, was recalled and under the same oath as before, and answering questions propounded by Mr. Travieso, testified as follows:

[fol. 81] The fifteen pages that you are showing me is a copy of the current account of the company with Banco Comercial de Puerto Rico, furnished us in connection with the checks that we had issued and the deposits that we made in the bank; when I say "we", I refer to the firm

of Rivera Soler & Co., Inc., the plaintiff; I got those pages from the Banco Comercial de Puerto Rico; I made application for these copies from the bank and either Mr. Iriarte or Mr. Andino delivered same to me; after the bank gave them to me I immediately delivered them to the office of Mr. Hastrup and left the same with them; Mr. Davila returned to me that account; I don't remember if it was returned with the books or not, because much of this data Davila would call for by telephone and request me to furnish him this or that, and I would supply the papers needed, and I would not get a receipt, except when they asked us for books of account; the fact is that they were returned to me by the office of Mr. Hastrup.

[Answering questions propounded by members of the jury, the witness testified:]

The original statements from the bank were destroyed by the fire; I don't know where were those documents at the time that they were destroyed; I thought that they were in the safe but when we opened the safe we didn't find them; as to the cancelled checks, we supposed they were in the safe, but we were unable to find them in the safe afterwards; as to whether the general cash book of the corporation was destroyed, we didn't need to carry a cash book because the cash book is an account with the Banco Comercial or the Royal Bank of Canada, and as our cancelled checks were destroyed, then we asked the Royal Bank and the Banco Comercial for a detailed statement of the checks, the cancelled checks which had been destroyed, and which appear in the statement of account there; the check book of the Banco Comercial, the check book in which we retained the stubs was destroyed, but with reference to that stub book, as we had it, it is covered by this statement from the bank; there is no way of determining who those checks were issued to; that is the truth.

The statement only shows the amount for which it was [fol. 82] issued and the amounts of the deposits; there is a record of the actual movement of the cash of the firm; we carried an account in the ledger with the Banco Comercial and also with the Royal Bank of Canada; those checks were not paid by voucher; we didn't make a voucher first and then make out a check; the amounts appearing on the bank statement could not be identified by the account; as

to whether the account of the bank in the journal would not show to whom the check was issued, in the current account, for instance, if we issued a check to Cantero Fernandez & Company or Sucesores de Blanes or to any other house to whom we owed money in the account current book would appear the payment of the check by number and amount.

These disbursements can be identified; there are checks, for instance, that we issued for payment of salaries, and from the amounts it can be determined to whom they were issued; for instance, we would buy four or five dozens of chairs, or any amount, and that would go to the furniture and fixtures account, and it could be identified by the amount in the current account; as to a disbursement in the amount of a thousand dollars, the jury could determine who that amount of a thousand dollars was paid to from the ledger; from the work on the island it might not be possible to determine; we would receive a number of invoices from our agents and we would pay twenty-six dollars and something, for example, for work done; then monthly I would take all the checks issued during the month and charge the total to cost of production, and to that account so many checks, and to the other account so many checks, and monthly I would reconcile the account with the bank.

A Juror: I still don't see how he could relate any particular disbursements here with any particular account in the books. Or how we could do it.

A. If the court will permit, I will be pleased to show that by the books.

The Court: He has a right to do that. But the books are not here.

Mr. Travieso: We can do that later.

The Court: I think counsel understands now what the jury are trying to get at.

[fol. 83] The Witness: At the end of every month, when I received these statements of account of the Banco Comercial de Puerto Rico and of the Royal Bank of Canada I checked the account with my stub book and my check book; they were always correct. All the entries for checks issued and for deposits made in these statements of account relate to the business of Rivera Soler & Co., Inc. All these

deposits, for instance, lately in the Royal Bank of Canada, which are the vouchers we have now, may be checked easily, the deposits which appear here in the statement of account of the Royal Bank, together with the slips in the voucher; every time we sent the drafts to the bank the bank would discount them and would give us a slip; those slips are in the files that are in evidence and they can be checked with the account current of the Royal Bank.

The petty cash book that was introduced and admitted in evidence in this case was delivered by the insured to the office of Mr. Hastrup; we delivered to the office of Mr. Hastrup all the books and all the documents and vouchers that we were asked for; any paper that Mr. Hastrup asked us for and that we had in our possession was turned over to his office; I myself delivered this petty cash book to the office of Mr. Hastrup; I delivered that petty cash book in reply to a letter or communication from Mr. Hastrup; at one time Mr. Hastrup wrote us a letter asking for the supporting documents for the petty cash, and as he could not do anything with the supporting documents alone, of course we had to deliver to him also the petty cash book to enable him to check up the vouchers; but it seems to me that he only requested from us the petty cash vouchers, and that I took to him also the petty cash book to enable him to make a good investigation. The letter that you are showing me is the letter received by the insured; in this letter he asks for the petty cash vouchers since January 1st down to March 13th, 1932, and down below I stated in a note: "Sent petty cash vouchers and also the petty cash book." With the vouchers alone he could do nothing, so I sent Mr. Davila the petty cash book also; we got the petty cash vouchers and the petty cash book back from Mr. Hastrup's office; they are the same ones that were sent to his office.

[fol. 84] [The aforementioned letter is offered and admitted in evidence and marked "Exhibit No. 37 for Plaintiff".]

The notebook called administration and general expenses, which is marked "Exhibit No. 7 for Plaintiff" and which you are showing me, is the account of administration and general expenses; this book was delivered to the adjuster; I delivered it personally; all of these books were

delivered there to his office by me; including this one, which we got back from Mr. Hastrup's office with the rest of the books. The book marked "Exhibit No. 15", containing a number of invoices and vouchers and so forth, that you are showing me was delivered to the adjuster for the insurance company, by me personally, and I got it back from the adjuster.

Cross-examination.

By Mr. Brown:

[Answering questions propounded by Mr. Brown, the witness, Mr. Wolf, testified:]

The plaintiff corporation did not have a cash book; it had a petty cash book; the cash book was not necessary because the bank statements were all that we considered necessary for that purpose; the cash book was the current account with the Banco Comercial or with the Royal Bank of Canada. I did not check these bank statements with the ledger every month, I checked the account of the bank with the stubs of the check book; that was the only check I made and, of course, I compared the balance of the account as per the statement from the bank with the bank's account in our ledger. I did not open these books myself when I went with the corporation, the balance was carried forward from before that; some of the books that are here were started or opened by me; these books that I started were not started along the time that I commenced work for the plaintiff corporation; if, for example, the account for the Commercial Bank was opened, they were carrying on an account current with the bank when I entered their employ.

Recapitulating all that document and the statement of the Banco Comercial, the entries were made in the books; the ledger, for instance, that was presented in evidence here was started by me; with date previously existing and from vouchers which I was able to find; the petty cash [fol. 85] book was opened by a young man there in the office and afterwards I carried it on; the journal that is called "registro de comprobantes" (voucher register) was opened by somebody else; the inventory book was opened by me; the current account book was not opened by me, that was started by somebody else; as to the agent's book

I don't remember very well whether it was in use when I went in there or not; I don't remember whether the book called administration and general expenses was started by me; the handwriting is mine, but I don't remember when I opened that book or not; it is entirely written in my handwriting.

As to whether all new books that were opened by me there were former books kept by the firm from which I took the first entries, from which I copied the first entries, they had no ledger in use; they depended altogether on vouchers; I made a resume of everything and then I started in to work in books of the company; I did not open a ledger as soon as I started; in the ledger there are entries from 1929; I started this ledger when I first went to work for the corporation, because I can start working with a corporation on that date and have made entries of years before that; any new books that I opened were opened along in the beginning of 1930, when I commenced to work for the company; when I went to work there in 1930, in the early part of that year, I opened that ledger in accordance with the vouchers which were then on hand; I don't remember the date. I did strike a trial balance as to the accounts current every month; I did that in no books; a trial balance can be taken for any month from the books; I did that every month to see if the books were in balance; I don't remember who the bookkeeper was of Soler & Company before me; I know they brought there once a person named Luis Garcia, and as they paid him very little he did poor work.

F. A. C. HASTRUP, a witness previously called on behalf of the plaintiff, was recalled, and under the same oath as before, answering questions propounded by Mr. Travieso, testified:

The pages that you are showing me, which contain the account current of the corporation Rivera Soler & Company with the Banco Comercial de Puerto Rico, were in [fol. 86] my office; they were received on April 18th, 1932; that is the stamp of my office on the top thereof; I do not recognize the pencil figures on two or three of the pages, they were not made by me; I know Mr. Davila's handwriting; I recollect his handwriting very well indeed, but not his figures; I couldn't state yes or no.

[The aforesaid statement was offered and admitted in evidence and marked "Exhibit No. 38 for Plaintiff".]

JUAN I. GORBEA, a witness previously called on behalf of the plaintiff, was recalled, and answering questions propounded by Mr. Travieso, testified:

The statement marked "Exhibit No. 38", which is the statement of account current of Rivera Soler & Company with the Banco Comercial de Puerto Rico, has been in my possession for about two months, and this is the statement of the account of Rivera Soler & Company with the Banco Comercial de Puerto Rico, of the checks drawn by Rivera Soler & Company against that bank, and deposits made, and I used this statement in the reconstruction of the cash book; as I did not have any cash book, I took this statement and for instance in the month of March, 1931, I added all the disbursements and then I checked that amount with the total disbursements in the account of the Banco Comercial and the same thing with the deposits, and that agreed; and besides that I took item by item and some of them, the most important, for instance labor and expenses and salaries, and I took check by check and balanced those with the account; I found the account was correct; I did not find that any of those entries in that account referred to payments that had nothing to do with the accounts or transactions of the corporation, they were proper disbursements of the business.

I did the same thing with the account of the Royal Bank of Canada; as to whether I was able to trace every one of those checks that appear in that account, and trace them to the books and find that they were proper payments of the plaintiff corporation, in the case of the most important checks, about one hundred or two hundred dollars; but in the total they were correct, as to the disbursements for [fol. 87] each month; those accounts go as far back as March 2, 1931; to November 1931; this is the closing of the bank; that was when the bank went into receivership; this account with the Banco Comercial was closed February 25th; there is no balance at all there; it is possible for any person understanding books to take this bank account and the books of the corporation and trace the checks to the

books and the purpose for which the check was issued, and I did that; any accountant, in my opinion, can do the same thing.

[Answering questions propounded by the court, the witness testified:]

If I find in the bank statement a debit of let us say $1,000 I can then go to the books of the company and get not only a book entry but supporting proof on that day of that item, a bill or invoice from some customer that that amount was paid; that can be done with each of these items.

[Answering questions propounded by members of the jury, the witness testified:]

In my opinion there are many corporations that use simple books, and you often find many mistakes in the books, and an absence of many books that are needed for the business; I often find that many corporations use plain sheets of paper for a cash book, and when you call that to their attention they say they don't want to spend much money for that, but that their business is to manufacture, and they don't pay much attention to that, if we can get a final statement of profit and loss; as to whether I think the accounting system of this firm is satisfactory without a cash book, as long as you can reconstruct it by the statement of the bank, it is all right; you can trace all the items; in the case where a check was issued covering several small items, you can trace them in the total; the account shows all items paid by check; you take all those items and add them up, and it agrees with the amount disbursed; all cash and petty cash disbursements were paid by check; the petty cash is very small, fifty or sixty dollars a week, and the other accounts were paid by check; in other words, as far as the efficiency or sufficiency of a bookkeeping system, this account in the bank, with the other books of the corpora-
[fol. 88] tion in this particular case is just as good as if they had kept a cash book, for the purpose of an audit.

Manuel J. Wys, a witness called on behalf of the plaintiff, after having been first duly sworn, and answering questions propounded by Mr. Travieso, testified:

My full name is Manuel J. Wys and I am an expert mechanic for sewing machines; I practice my profession or trade in San Juan. I was once employed by the plaintiff in this case, Rivera Soler & Co. Inc., as an expert mechanic; I don't remember very well, but since that time when he was working on Sagrado Corazon Street; I may say about one and a half or two years, something like that; I do remember the fire that destroyed the factory of Rivera Soler & Company; I do not remember the exact date, it was about two years ago; prior to that fire I was in the employ of the company as a mechanic; from the time the plaintiff moved from the other place where he was working, my job was to mount his machinery and take care of the whole factory, including electric motors; my duty was to keep this factory, including electric motors; my duty was to keep this factory in good condition, running; the day before the night of the fire I was there in the afternoon; when I was there the last time the factory was not working in the afternoon; it was a Saturday, I think, and they don't work in the afternoon; it was a Saturday; I cannot remember very well at what time I left the factory, but perhaps four o'clock or something like that.

I used to drop into the factory in the afternoon; I cannot state from memory the number and description of the machines that were installed in this factory, but I think there is an inventory covering that; I don't know anything about the electric iron; I didn't have charge of them as mechanic. As to whether I can state whether all or any of the machines appearing from Exhibit B were there the afternoon previous to the fire, before I left the place, the inventory is about right; I cannot say exactly; I can say about the special machines that I paid special attention to. [The witness reads from the exhibit:] Fifty-six machines, Singer No. 9510; 2 machines Singer No. 9512, that is right; that is a cotton machine; twenty-eight machines No. 9610, [fol. 89] that is the same type machine; they were new, almost new; three machines for button holes, that is right; eight machines, Singer No. 9501; those machines are the ones that instead of gears use a belt; I remember them very well; two machines No. 9603 for perforating; I didn't pay much attention to that, I used to see it there; this perforating machine has a little motor and it was there.

One machine for covering buttons; one for pleating; one for piping; that is for making a French pipe; there were two of them; four machines, Wilcox sewing machines; one perforating machine; one machine for picot, with its motor; two 112 W 115 machines; that is a double stitch machine, with two handles; one 5212 machine; that is a side seamer, for shirts; one cutting machine, United States, two cutters "Eastman", one for shirring laces, and one 815 machine for sewing with three threads, an over-locking machine with three threads; one 22 W 100 for double hemming; that is an old type machine; one machine for sewing buttons; its class number is 114-1; one 68-7 machine for sewing buttons, for the same labor but a different class; one 50-110; that is a trucking machine; one attachment for piping; that is an attachment, not a separate machine; one general electric motor, 2 H. P.; four motors, high current, ¾ H. P., and three ¼ H. P. motor, and one 3 H. P.; that was the big one; that was on the floor instead of putting it up, it was too heavy; two motors of 2 H. P.; each were not in use; they had no use for them, because they were there only for replacing the others in case of accident; now these 86 spaces for benches, they were there; eighty-six thread carriers; that is the bobbin winder; eighty-five transmissions; sixty-three ball bearings, that is for the shaft; three individual stands; 240 feet of steel shaft; that is cold rolled, 1-3/16ths; they were used too; that is standard; eighty-seven feet of three-inch belting; I don't know about that.

There was the belting in use in the motors, for transmissions; one lot of accessories for machines; there were three boxes; I don't know what was in them, but there were three boxes of accessories and parts, pulleys for belting, and so fourth; they were spare parts; I don't know what condition they were in because I never took a look at them; [fol. 90] thirty-five electric irons; I don't know about that; that's all; that's the end of the list; with the exception of the electric irons and some of the belting that was not being used, the rest of the articles and machines on the list were there at the time that I was last at the factory about four o'clock on the afternoon of Saturday, the day before the fire. I am something like a contractor; I make contracts with various factories to keep them running, to keep their machinery in running condition; I work as any

other professional man, I have my clients, I serve them and they pay me and that is all.

I used to go once a day all the time and see if something had happened; if anything happened they called me up; my duty was to keep the factory in good, normal, running condition; the factory of the plaintiff was in that condition the last time that I was there; always there are a couple of machines that are dismounted; in all the factories you can see that; when there is something wrong I take the ones that are not working and put up one of the others; I did at one time make a drawing or a sketch of the emplacement of these machines in the factory, describing the factory; the plan or sketch that you are showing me is the one I made; there are two, one refers to the upper story and the other to the ground floor; as to whether that is in exact reproduction of the layout of this factory, I am going to tell you; I was asked by Mr. Rivera Soler to make a sketch of how the factory was; of course, I could not remember exactly how everything was; of course, the measurements I could not state from memory, so I went over there to take the measurements, to make a good sketch; I could not appreciate how many feet in front and how many feet in length, but in a general way this sketch is correct.

These marked here are irons; I remember where everything was. I went there after the fire and measured the remaining walls of the building, so that I could make this sketch, and on that basis from my recollection of the factory I made this plan, which shows the emplacement or position of everything in the factory; and that is correct, both upstairs and downstairs. As to whether those are the machines that according to my testimony were there the afternoon previous to the fire, this is exactly true in regard to the machines; now in these closets—I remember [fol. 91] that in all these places there were closets, but I cannot state how many of them; those closets were used for keeping material and clothes; I didn't pay any attention to what was inside of the closets; they had doors and were closed.

[Mr. Traviesa offers these two plans in evidence but the admission thereof is postponed until after Mr. Brown has cross-examined the witness.

Answering questions propounded by Mr. Brown, the witness testified:]

My employment was to take care of certain machines and keep them in repair; there were some machines there that I did not have to do with; the perforating machines for instance, the cutters, the lace machines, for example; I never touched it, because I didn't have to; but I was supposed to do it as soon as necessary; the machines that required the most constant attention were the sewing machines; I said that I used to work for Rivera Soler before, since he was working in Sagrado Corazon Street; formerly his factory was at Sagrado Corazon Street, in Martin Pena, and he moved; I worked for him in the former place occupied by Rivera Soler & Company at Sagrado Corazon Street, the name of the street where the factory was burned was Pumarada Street.

Rivera Soler moved the machinery that he had at Sagrado Corazon Street to the factory that was burned, to Pumarada Street; I cannot remember when was it that he moved the machinery; I don't remember how much time I had been taking care of the machines of this company in the other place, on Sagrado Corazon Street, before they moved, but it was a few months; when the machinery was removed to the factory that burned on Pumarada Street I set the machinery up there, the machinery that was moved; there was also some machinery there at the new factory when the machinery of Rivera Soler & Company was moved from Sagrado Corazon Street; I mounted that too; the machinery in the new factory before Rivera Soler moved in there was owned by a corporation, I don't remember the name, but it was a few words, a short name, like A. B. C., or A. B. Z.; it was Pedro J. Walter, or something like that, with Mr. Valluveras and Mr. Pumarada, [fol. 92] it was a corporation; before Rivera Soler's machines were moved in there were about twenty or twenty-two or something like that, mounted; sewing machines mounted; there were some machines unmounted outside; I don't remember how many, perhaps eight or twelve; and the balance of the machines that make up this list here were moved from Sagrado Corazon Street and set up by me.

All the machinery that Rivera Soler had at Sagrado Corazon Street was moved to Pumarada Street; these two

lots of machines made up all the machines that were there. As to whether there was any change in those machines, any additions or anything taken out from the time that I set them up, not that I know of, in regard to the benches, because the machines are easy to change; if a machine is in good running condition and another is in bad condition, any operator can take the bad one out and put in a good one. I don't know whether or not Rivera Soler & Company occasionally sent out any of those machines to people who were doing work for them; I never asked about that. The two plans that I have made were made right after the fire; I can say that as to the machines, the benches, the power tables, they are right; it is correct as to those; I did not have the dimensions of the tables, but I know that there were so many tables; I never measured them, but as I said before, knowing there was a bench here and a machine, and knowing the measurements of the building, I knew where to place them, and I knew there was a bench here and a space here, and two sets of tables here, and a closet here, and from the measurements I knew that those things were about here; the perforation machines used to be on the first floor before the fire; they never moved them.

I did not have much to do on the first floor, but the office was there and I came around there; these were iron tables; I remember these because the carpenter who did the work put these on; the carpenter filled this out for me in the plan; I did not know exactly the dimensions of these tables and benches here; an inch more or less. What is marked "Royal" is a typewriter, I think it is a typewriter; I remember the office very well, that is the first thing I saw when I came in; as to whether I know if that was there or not the day before the fire, that day I stayed longer in the office than any other. The square space that I have marked [fol. 93] with a certain name was a closed space for keeping silk; that is what I was told it was; I don't know what it was, I had nothing to do with it; the first three items on this list: fifty-six, two and twenty-eight Singer machines, make eighty-six; further down on the list there appear eighty-six spaces for benches or banks, then a little below that there appear eighty-five transmissions, and below that there appear 240 feet of steel axles; there are in direct order 86 spaces for banks, 86 thread carriers, 85

transmissions and 63 "chumaceros", which are ball bearings; they were all assembled together; that makes up the power table, and when those are sold they are sold all together; in other words, the bank and the other things, and the transmission, all form part of the machine; the company sells it all as one article.

So, if I find in a list or description a Singer machine set up, I would understand that it carried with it the bank and thread carrier and the transmission, but not the bearings; I don't know how long Rivera Soler had been using the machinery in their place at Corazon Street before it was removed to the other factory, and as to whether I know how long the machines that were in the new factory had been in use before the Rivera Soler machines were moved over there, I don't know the time before that that they were used; I don't know whether during the time that I took care of them any new machines were put in; I don't think so; no sewing machines; as far as I can remember, no other sewing machines; perhaps some other kind of machines, but not sewing machines; I don't remember. I don't know anything about the 35 electric irons; I never made an inventory of the number of the machines; I know that the company made an inventory, but I didn't make any; I don't remember when that inventory was made.

I had absolutely nothing to do with the fixing of the prices appearing on Exhibit B attached to the complaint in this case. I know there was an inventory made of these machines because I remember very well that fact, because I was fixing a machine when Mr. Berrios asked me about it, about the machines that were there, and I counted them up, but I don't remember now how many were there; he asked me how much they were worth and I said they were worth so much new, but not used machines, because there is no standard; they may be worth as much as new, or at [fol. 94] other times only fifty percent as much; usually they are worth eighty percent on account of the demand in Russia; they never have a standard; in 1932 when this fire occurred, there was not a lot of used machines on the market; it is hard to get used machines in Puerto Rico, unless you order them from the United States, and you have to pay to bring them down; you can make an estimate as to the value of a used machine, but it is hard to put a price on it; as to whether a machine that has been taken care

of is worth no more than a machine that has been ten years in use, perhaps, if you make changes; that is what factories do every day, replacing and changing worn parts every day, in the same factory, we have the parts in the Singer factory.

Mr. Brown: Now, there is no objection to the plan showing the upper floor where the greater part of the machinery was placed, with the understanding that this plan was designed to give a general representation of the situation on that floor, and is not drawn to scale and is not precisely exact, as to the length of the tables and the dimensions, which I think is the witness' testimony on that. As to the plan showing the first floor, it is objected to because of certain legends upon which it may have some significance, and as to which the witness has stated he has no personal knowledge. Moreover, as to the first floor a part of the plan was prepared by somebody else. A carpenter, he said, prepared the tables.

The Witness: When Mr. Soler moved to the new place he had a carpenter make those closets and tables and everything; in preparing the plan I didn't get information from the carpenter; I used to go near the carpenter and give him ideas, and that sort of thing. I know those iron tables were there; the dimensions of the different things shown in the first floor plan are all estimates, counting the doors, knowing how many doors there were in the office, and so on; I did not have the exact measurements.

Mr. Brown: Well, with that understanding, and with the elision of certain of these legends, I would not object to the introduction of this plan.

The Court: Are those legends in Spanish?

Mr. Brown: Yes.

[fol. 95] Mr. Travieso: I agree to eliminate that. [Legends objected to are erased by Mr. Brown.]

[The document is admitted and marked "Exhibit No. 39 for Plaintiff."]

The Witness: I cannot say exactly how many spare machines there were; I can make an estimate; perhaps twenty or twenty-five, but I cannot say exactly; I don't know because some days they had twenty, and some days fifteen; I call spare machines those that are not in use, and I put them on the stand, and the next day I put them on the

power table again; there were about twenty spares, something like that; I am not exactly sure about that; I say I can't remember very well.

Q. 1. Apparently the claimant forgot to ask for those twenty machines. If there were twenty machines or less, your memory is defective.

A. Perhaps. It was two years ago. I never counted any of these machines, nor did I ever make a memorandum or list of them.

[Answering questions propounded by Mr. Travieso, the witness further testified:]

As to what is considered to be the life of one of these sewing machines, coming from the factory it depends on the speed at which the machine is running and the use to which it is put, but in a general way, as a standard, five or six years in good condition; after that time, after five or six years, the machine can be kept going if you change the bearings and the running parts and then that machine is the same as new; the machines that were there on the afternoon previous to the fire were used machines; some of them were old and some of them were practically new; all of them were in good running condition; they were rendering service just as good as if they were new; my work consisted in changing these parts, bearings and so forth whenever it was necessary to do so to keep the machines running and they had been kept running that way by me; the factory don't have to do anything but buy parts; they have to pay me, and I kept the machines in running condition; I didn't state the total number of sewing machines; fifty-six Singer machines No. 9510 is right, but as to the total I didn't add them up; then I stated that there were 28 Singer No. 9610 machines; those were new; and then 8 Singer No. 9501, [fol. 96] which makes a total of used and new machines of 92; all of which were in good condition; so that there were 92 machines in good running condition the afternoon before the fire and I saw them there.

[Answering questions propounded by Mr. Brown, the witness further testified:]

It is my opinion that the only test of value is efficiency; every machine has wearing parts, whether an engine, a boiler or a motor; in this case the bearings, the running

parts, that is what wears out with use; there are other parts that do not wear with use, but are affected by climate, temperature changes and salt air, but there is no fluctuation; the repairs that I made were of wearing parts, the parts in use; shafts and hooks; I don't know what bearings are worth, it depends on the class of the machine; the bearings in a 9610 machine are worth eighty cents, $1.10, it has four bearings and each one has a different price; altogether they are worth, say $4; the hooks are worth about $6.25 each; I don't remember the axle, I don't have any idea of that; I do buy axles, but I go to the company and buy them and they charge them direct to the account of the customer; as to whether I know if the same axle is worked over, or that they put a piece of steel and weld it and burn it down, the Singer Company, especially, they put the price on their parts according to how necessary those parts are to the machine, not according to the material in them or the labor in them.

There are certain wearing parts in an automobile; if you can make a good overhauling the automobile is worth as much as new; the banks or parts of the machine are sold with the machine; they are power tables; the woodwork on them deteriorates with time and use; the woodwork is affected by the climate; the metal does not oxidize, it is cast iron; cast iron is affected by corrosion on the outside, but it doesn't touch the metal; as to whether cast iron depreciates by contact with salt water and salt air, it takes more time. The transmissions are also part of the machine, and they wear and depreciate or deteriorate with time; each transmission has a little shaft of steel that can be changed, and something like a clutch of belting that can be changed also; these power tables were changed dur-[fol. 97] ing my time, I used to change them; when they became worn they made a big noise and I had to change them.

[Answering questions propounded by Mr. Travieso, the witness Mr. Wys further testified:]

The power tables of those 92 machines that were under my care were not affected by the salt air, they were not rusted or out of commission; cast iron takes more time to oxidize, so you can allow a little time to the cast iron without painting it; Mr. Rivera Soler used to paint the

power table and the flywheel to protect them from the salt air.

JOSE RIVERA SOLER, a witness called on behalf of the plaintic, after having been first duly sworn, and answering questions propounded by Mr. Travieso, testified as follows:

My name is Jose Rivera Soler; I am the president of the plaintiff corporation; the corporation J. Rivera Soler & Company, Inc., was organized by me; as to whether I can state to the jury how those machines claimed by plaintiff to have been destroyed were acquired by the company and from whom, I can give you a general idea, but I would have to further refresh my memory by reference to the books; in the first place I had formerly a personal business of my own, in which I was engaged for several years, and then the work of this nature started in Puerto Rico, a relatively new business here, and I purchased at first a number of new machines; these machines I purchased for the purpose of working for a house in New York called Dolcey, Inc.; at that time the business of this house, which was new in Puerto Rico, had a good acceptance in the American market, and they suggested or requested that I increase the capacity of my factory. I proposed to them that they should install machines for their own account to enable me to produce the merchandise that they required, because I was afraid that after I had made a large investment in machines that they might leave me without work and I would have the machines idle. That was the first number of machines that came into this business; from Dolcey I think there were around 24 or 28 machines; I don't remember exactly; that purchase can be checked from the records of the local Singer Company because they made the nego- [fol. 98] tiations for the sale, and collected through New York from Dolcey, Inc.

Later on, what I had been afraid of happened; the house of Dolcey, upon being faced with a special competition here in Puerto Rico from other houses, decided not to continue working in Puerto Rico; then I went to New York to see if I could succeed in convincing them as to the convenience of continuing in Puerto Rico, and they refused to do this, and then they proposed to me that I should purchase the machines from them, because to take them up, to take up

the machines here in Puerto Rico and ship them to the United States was not advisable, because in the first place they might be very easily broken, and besides the cost would be very high because each machine had to be carefully packed and boxed or crated; then they offered me a business proposition which was attractive to me, whereby I was to pay them $1,400 under any terms I wished; that is, that from the work of the machines themselves I could pay them for the machines.

Then I came to Puerto Rico, and as I was not satisfied with the way the corporation was developing as run by my partners, I decided to take these machines and put them to work in a separate business; for that purpose I had even had letterheads printed, of which I have a sample here; but at that time my partners promised to give me what I wanted, which was working capital to develop the business of production for our own account, and at the same time they proposed to me to purchase from me the machines that I had purchased from Dolcey at the full price of the machines, on condition that they would pay me in the same manner that I had agreed to pay Dolcey, crediting Dolcey for what was due them and crediting the balance of the price of purchase to me; so I transferred my machines to the corporation, and the corporation agreed to discharge my indebtedness to Dolcey as they might be able to, and as the books will show they made payments every few months on account of that; then the capital which I was offered at that time I never succeeded in getting it into the corporation, and the result was that I had a larger capital than all the others and I was receiving the same benefits as my partners; so then I wanted to withdraw the machines and enter into another business, but the house would not permit this.

[fol. 99] Then I went to New York, which I was in the habit of doing often, going up sometimes three times a year; some of those trips were for the account of the firm and others for my own personal account. Especially the last trips were made for my own account because I had decided to establish a new, independent business apart from the corporation, and when my partners saw this attitude of mine and became convinced that there was no way of keeping me in the corporation, then they looked for the means of selling to me their shares of stock in the corporation, and

I looked for buyers for those shares, who would also promise me to raise capital to work this merchandise for our own account; as to the other machines, some were contributed by the second group of partners who entered the firm, Escudero, Valloveras and I don't remember the name of the other; those men brought machines into the corporation.

As to how these machines were paid for, I would have to give a history of that because when these machines were brought in these other machines which I brought in and which were prepared for my other business, and these machines, were all brought into the building which the corporation had in view to occupy and they were appraised; the value of those machines was appraised and there was credited to the other partners, the three partners, an amount of $2,600 and the balance of the total value of the machines was credited to my account; a memorandum was made about the description of the machines and the prices; this is the memorandum; that was made in the office of my bookkeeper; I gave him the estimates on different sheets of paper so that he could type it on the machine and after he made it I checked it with the data that I had given him; it is correct; the machines that are described there are the ones that were turned over to the company by me and by the other three men that I have mentioned.

At the time of the fire those machines were in the premises that were burned; they were totally destroyed. The machines that I acquired from Dolcey & Company, and which I sold to the corporation, were at Pumerada Street, in the premises where the fire occurred, at the time of the fire and were also destroyed; they were a total loss; besides the machines that I have already described there were [fol. 100] no other machines acquired by the corporation or sold by me to the corporation; it may be that there were, because there might have been some machines that were purchased specially, but really I don't believe there were any. Now as to parts of machines, those were bought. The machinery detailed in the list of machinery that you are showing me, and which is attached to the complaint as Exhibit B for plaintiff, was all there in the factory at the time of the fire; that is a complete list of all the machines belonging to the company and destroyed by the fire.

As to whether any of those machines was taken out of my

factory previous to the fire, those machines cannot be moved; there is a big table with as many as sixty machines, and to take out one bank you have to start in by disconnecting from the first one and take them apart, and those machines are all fastened there to the floor, and it would be a long and difficult operation to remove them; one of these machines could be removed; the head of the machine could be removed; none of those heads of machines were removed. I was in the factory for the last time on the Saturday previous to the fire, from one to one-fifteen or one-thirty; we finished on Saturday at one o'clock and after that, as the operators filed out we delivered to them their pay envelopes and that was done by my wife; I have to wait for her to finish with that before we can go away; I left the factory at least one-thirty on Saturday afternoon.

As to the other property that is claimed, furniture and fixtures, tools, implements and so forth, they were all there at the time of the fire; they were all in the factory; the amount of raw materials for production, amounting to $9,440 claimed, was in the factory at the time when I left the premises; that amount stated there is taken from the books; I know, aside from the books, that at the time when I left the premises that were destroyed by the fire, the materials or quantity of material was there in store; we had two long cutting tables that ran the length of the room, which had about sixty to sixty-six inches in width; it was a little wider than that desk, and it ran the entire length of the building; there was just a space of two feet at each end; that table had a sort of a shelf underneath, and there the material was stored which was to be cut up; that material was cut on top of the cutting [fol. 101] table; to fill those two tables, or rather the shelf space under the tables, it would be necessary to have many thousands of yards of cloth; the amount of materials for production that I saw there under that table and on the shelf was more or less the amount that is stated in Exhibit B, and which we are claiming.

I could not state exactly the number of yards that were there; that material was not counted every day nor every week; this table to which I have referred to was on the ground floor, the main floor; that building had in the rear part a basement also. Exhibit 39a for plaintiff, which you are showing me, is a plan of the ground floor of the fac-

tory; these two long tables that you see here on the side here. [Witness points to the left of the plan, marked with the letter "A".] On the shelf under these tables that material was kept; there was one shelf under the tables built about four inches above the floor; the shelves were about four inches above the floor; those two tables to which I refer are used for the same purpose; we had that material for production stored under both tables; the cutting was done on top of these same two tables; both of them were in use; they were cutting tables; I don't know whether any of this material for production was taken out of the factory before the fire; at the time that I left the factory that afternoon that material was there; as to how I know it was there, in my factory I am the production man and one of the departments to which I gave the closest attention was the cutting department.

As to where the manufactured and unmanufactured goods claimed to have been destroyed were kept, we had, for example, for silks, a closet to protect the goods against dust and for instance the ironed cotton goods was over here in this department because here was where the ironing department was, where all the finished work was taken care of. [Witness points to tables that are marked in the plan 1, 2, 3, 4, 5, 6.] These are hangers; the manufactured goods were kept here; the finished work was kept here. [Witness refers to four shelves or spaces marked with No. 8, and there being others in the plan with the same number.] For the purpose of identification we call this 8x, statement by Mr. Travieso. Those spaces where the finished goods were kept are open shelves; those are the [fol. 102] finished product, the manufactured goods ready to be shipped. Those that were not finished were kept all over the place; they were being worked on by the workers, the operators; over here we have people stamping, those six spaces marked with the letter "E"; that is where the pieces were stamped.

They were taken from the cutting tables and taken to the stamping department and from there they were sent upstairs to the sewing machines; some of this merchandise would come also to the counters to go out to the street as outside work. What I am pointing at are spaces marked "C" and "H"; those are closets where this merchandise is kept; and the counters are marked "H", and in this counter

there should be two doors which I do not see shown here in the plan; the unmanufactured goods, or the goods in process of manufacture were kept all over the factory, where it was being worked on by the operators, going from one department to another; when they were terminated they came over here to the shelves marked 8x, because here is where they were ironed and from the ironing table they came back and were put away in these shelves.

As to the item of $2,524.50 for labor and goods in process I would have to get the assistance of my bookkeeper; I really never participated in the work of the accounting department; if he explains to me—; labor and goods in process means work that is not finished; unfinished work; sometimes one goes to the machine department and finds a piece that is finished, but still has to be embroidered, but others that are embroidered but not sewn together yet. We did work for firms outside of Puerto Rico; the American houses supplied us with the material and we supplied the labor and thread for sewing and embroidering; we got the material from the United States and the company supplied the labor and thread and other necessaries to complete the work; then I made out my invoice and took it to the bank, and they gave me credit for it and discounted it.

ADOLPH STEFFENS, a witness called on behalf of the plaintiff, after having been first duly sworn and answering questions propounded by Mr. Travieso, testified as follows:

[fol. 103] My full name is Adolph Steffens; my occupation is insurance loss adjuster and I have my business office here in San Juan; I am manager of the firm of Windle, Dargan & Company, of New York. As insurance adjusters we received instructions from the Insurance Company of North America to check a claim which was filed by the Handcraft Company, with the books and records of Rivera Soler & Company, established here in Puerto Rico; this claim was checked in our office and we sent a comparative statement of the result of our examination to New York, copy of which I have with me; for the purpose of making said investigation we examined the books that Rivera Soler had here; at the time I went to Mr. Rivera Soler's shop they could not show the books because they were in possession of Mr. Hastrup, so the first thing I did was to check with

other records that they had in their possession; afterwards the books were handed to Mr. Wolf, the bookkeeper of Mr. Rivera Soler, who took them over to our office and there they were examined by Mr. Quinones, my secretary, and myself.

As to how I found the accounts of the Handcraft Import Company, most of the styles tallied, with the exception of two or three items, the total difference being around 43 dozens out of a total of 572 dozens, most of the difference being in style 1003 in which the Handcraft people claimed 7/12ths while Mr. Rivera Soler's books 28 5/12ths. As to what was the value of the difference in dollars and cents, in accordance with the list sent by the Handcraft, I think the average per dozen is about $1.25, which would mean around sixty odd dollars; the Exhibit No. 9 for Plaintiff, which you are showing me, and which contains the account of the Handcraft Import Company with Rivera Soler & Company, looks exactly as the one that I saw in my office. The Insurance Company of North America wanted to ascertain whether the claim made by the Handcraft Importing Company was correct and tallied with the record of Jose Rivera Soler.

Mr. Soler told me that these goods belonged to the Handcraft Company, and as I knew that he carried insurance on their stock I asked him whether this stock was included in the claim presented to the other company; I was informed that part of the labor on these goods was included in said claim, but that these goods pertaining to the Handcraft [fol. 104] Company were not included in the claim against the Insurance Company of North America; the information that I got was that the labor that had been put into these materials was insured by this policy of the United Firemen's Insurance Company, and the materials were insured by the company that I represented; I informed my company that, in accordance with the statement that Mr. Jose Rivera Soler and some of the employees that I questioned, that the stock was destroyed by the fire in March.

This investigation was made in May, and I informed them with regard to the origin of the fire, that is, when it occurred and other details concerning the loss, but no definite settlement was made here in Puerto Rico; I don't know whether any was made in New York; I have received no further information. As to whether what was my rec-

ommendation as to the adjustment of this claim of the Handcraft Import Company, as far as recommendation is concerned, I made no recommendation; I only reported on the case based on my information, and I heard nothing further about it; I didn't recommend the claim as I didn't know the exact amount of the claim and whether it checked with the books of the Handcraft Import Company in New York; the Handcraft Import Company had that property appearing in those papers that I examined insured with the Insurance Company of North America; that is the claim that I investigated.

[Answering questions propounded by Mr. Brown, the witness testified as follows:]

The Handcraft Company had goods belonging to them in the possession of Rivera Soler & Company for the purpose of manufacture and they took out a policy insuring those goods in the possession of Rivera Soler & Company with the Insurance Company of North America, and after the fire in the establishment in which the business of Rivera Soler & Company was located occurred and was destroyed by fire on March 13, 1932, the Handcraft Company filed a claim for loss of their property that they believed was in the premises of Soler & Company and destroyed by fire; I was requested to ascertain from an examination of the books of Soler & Company and such other sources of information as I could what the amount of that stock was that was in the premises of Rivera Soler & Company and [fol. 105] destroyed by fire; to that end I examined this loose leaf book which is plaintiff's Exhibit No. 9 in this case, and also made inquiries of Mr. Soler and other employees of the company regarding this property and loss and I prepared a memorandum, a statement which I sent to my principal, giving the result of my investigation and my conclusions as to the amount of the property of the Handcraft Company that was so destroyed by fire, as a result of the investigation that I made.

This result that I arrived at as to the amount of the property was derived by me from the books of Soler & Company and also from information furnished me by Mr. Soler; there was a difference of forty-three dozen between the Handcraft books and the books of Rivera Soler; with that exception Mr. Soler agreed that my figures were cor-

rect; Soler showed more stock here than the list of the Handcraft Company; he showed 47 dozen more than the Handcraft claim; I made a detailed statement of the amount of the property that I considered was there on the premises at the time of the fire and destroyed, based upon the information given by Mr. Soler, and that is what I have before me here; this list gives the styles and character of the merchandise, and the amount; I can leave a duplicate of this memorandum; there are two copies there; this other is a list given me by Mr. Hastrup of the items claimed.

[Mr. Brown requests that the list as to which Mr. Steffens has testified, or a duplicate thereof, be marked for identification. Document marked "Identification No. 2, Defendant".]

The Witness: I don't know whether the loss was paid on the basis of this report; I think the amount of the claim was around $770.

Jose Rivera Soler, a witness previously called on behalf of the plaintiff, was recalled, and answering questions propounded by Mr. Travieso testified further:

As to who did the checking of the merchandise received by my company from the United States, before it was stored, there was no person who did that exclusively, but it was done sometimes by myself, other times by the cutter and other times by Mr. Wolf, but when Mr. Wolf checked it was with me because he didn't know very much about it; Mr. Wolf made the entries in the books; we had a loose [fol. 106] leaf book and we would check on that; there are some houses that send the invoices of the goods within the package containing the merchandise; when that occurred we checked the merchandise against the invoice; we checked a part first, and later compared with the invoice and when the final check was made if there was any difference the invoice would be marked Okey, and passed to the bookkeeper; so that either the invoice or the paper that I took from a scratch book was passed by me to Mr. Wolf, the bookkeeper, so that he could make the entry in the books.

Mr. Travieso: Your Honor remembers one of the exhibits, one of the books where merchandise is entered, was

admitted in evidence yesterday subject to the statement that the witness has just made. Mr. Wolf testified that, in cases where the checking was done by Mr. Rivera Soler in his absence, Mr. Rivera Soler would make a memorandum of the checking and pass it on to him for entry in the books.

[Answering questions propounded by Mr. Brown, the witness further testified:]

The plaintiff corporation, Jose Rivera Soler & Company, was organized in 1929, and before that time I had been in the same line of business for thirteen years; at one time I had a business established where the Fox Theatre now is, for three years; before the corporation was formed and while I was in business for my own account I purchased some machinery; there were about fourteen machines, Singer Machines, and there were cutting machines; one cutting machine, a United States machine; when the corporation Rivera Soler & Company was formed I sold this machinery to the new corporation; at that time it was three or four months since I had purchased that machinery; I bought them in the United States, in New York; I am not able to say from whom; I cannot say how much I paid for them either; prior to that time I didn't even carry on any books.

The first entry of machinery in the inventory of the plaintiff corporation, dated March 1, 1929, for the amount of $3,286.50 must be from the time the bookkeeping started; that was after the formation of the company, when we started [fol. 107] the books; that was the machinery that I owned, that I sold to the company; as to whether that was all of the machinery that Rivera Soler had when this corporation commenced to do business, that I remember now; if I could refresh my memory I could possibly remember better. I received part payment for that machinery in shares, and the other part was owing to me by the corporation, and credited to my account; I am in doubt if it was fifty or sixty shares that I received; the partners agreed to contribute an amount equal to mine, but they contributed at that time $3,000 and the balance of the money they never did contribute; the par value of these shares was $100 each, so fifty or sixty shares would have represented a par value of five thousand or six thousand dollars.

For these shares I sold the business in general with the machinery; there was material belonging to me there also, because at that time my principal business was along different lines; I worked with a house that sent me and sold me material; that was G. Farrie; they would send me the linen and when I returned it I charged them the labor and the material as well. I purchased my shares in the company with that machinery and some merchandise belonging to me; the other shareholders only put in money; Dolcey & Company, in New York, at my request, furnished some machines for my company to work with, and that machinery was noted in my books as being on deposit; that machinery was purchased here in Puerto Rico from the Singer Sewing Machine Company; I realy don't remember when this machinery was purchased by Dolcey & Company and put in; that should appear in the books because there is a charge from the Singer Sewing Machine Company; I couldn't say whether that was in 1929 or 1930.

After the business started I purchased some machines later on besides the machinery that I bought from Dolcey; after the purchase of the Dolcey Machinery; as to the item of December 31, 1930, of $1,283, I would have to call on my bookkeeper for information in order to be able to answer those questions. Because Dolcey & Company had withdrawn from sending business to Puerto Rico, I went to New York and purchased this machinery for $1,400, and then I sold this to Rivera Soler & Company for a larger [fol. 108] amount; as to whether the amount of $2,353.88 represents the machinery that I bought from Dolcey & Company and sold to Rivera Soler & Co. Inc., I don't know how the entry was made; I know that in the books there was credited directly to Dolcey $1,400 and the difference was credited to my account. As to whether Dolcey & Company took back a chattel mortgage on this machinery to secure this debt I don't remember how the operation was effected; I know that the operation was made from here in Puerto Rico, because I brought the proposition down here to Puerto Rico and I know the matter was put through from here, but it does not seem to me that any document was given to them; the corporation Rivera Soler & Company assumed this debt of $1,400 to Dolcey & Company; and I sold this machinery to Rivera Soler & Company for $2,253.88.

The next ledger entry except two small ones, one for nine dollars and another one for $7.25, is stated to be the contribution by various lots of machinery according to invoice, for an amount of $7,522.42 which entry is dated July 13, 1931; that is the time that Messrs. Pumarada, Escudero and Valloveras became stockholders in the corporation and they paid for their stock, in part, with machinery; we agreed upon a value of $2,000 for the machinery that they brought in; the $2,000 of machinery that they brought in is not part of those $7,522, it was $9,000 and odd; these three gentlemen, Pumarada, Escudero and Valloveras, got fifty shares of stock; they did not pay for that by giving machinery valued at $2,000 and the rest in money, they bought the 30 shares belonging to the previous stockholders, and $2,000 was contributed in machinery and other accessories; when they brought that $2,000 of machinery that machinery became the property of the corporation; as to what the item of $7,522.42 for machinery on July 13, 1931, is, I think that was divided up because when the entry was made part of it was for other things; it was not all machinery; they entered that accordingly in the books.

[At the request of Mr. Brown the document is marked "Identification No. 3 for Defendant."

Mr. Travieso offers in evidence the memorandum that was identified by the witness as a memorandum that was made by him at the time of bringing in the said machines and [fol. 109] furniture and fixtures and so on, to the company, and the same is admitted and marked "Exhibit No. 40 for Plaintiff."]

As to whether part of the furniture and implements in that list that you are showing me was part of the furniture and implements that I sold to the corporation at that time, part of them were mine and part belonged to Pumarada, Escudero and Valloveras; still as plegadizas.

Q. 1. Twelve ironing chairs and twelve packing tables, six wardrobes, eight show cases, six show cases for machines, six long tables, and a number of other items such as desks, and tables and files, desk chairs and cabinets. Where did you obtain the machinery or such part of the machinery as you had in this list, and such part of the implements and furniture as belonged to you that appear in this list that were then sold to the plaintiff corporation?

A. The shelving and wardrobes, they were made. I purchased the lumber and had them made.

The Witness: The shelving and wardrobes were made previous to the time of the sale; the machines I bought in various places, the greater part of them from the north; I brought the greater part from the north; around that time I made about three trips to New York, because I had every intention at that time to leave the corporation; I brought the greater part of the machinery included in that list from New York; I bought it from various houses; one of them was Smith Brothers, in 28th Street; at the time that that memorandum was made the machinery was in the establishment at Pumarada Street; before they were taken to the Pumarada Street factory this machinery and these articles of furniture were out at my farm in Guaynabo; as to whether I could tell by looking at that list which machines and which of the other items belonged to me that were brought in, in their machinery they had machines No. 9510n for instance, and I also contributed machines No. 9510; these two machines were also contributed by them; they were machines with two handles; I remember that well because they were machines that we didn't use; this is another machine that they contributed; taking one with another, they had about 21 or 22 machines that they con-
[fol. 110] tributed to the corporation; they had some tables also; they had some show cases also.

As to whether some of those tables and other furnishings belonged to me, I had many of them; there is a table that I always remember as being brought in by them, because it was so long and seemed almost a part of the building; it was one of those long tables that appear in that plan; it was a long cutting table and was put in as $105; of the twelve packing tables they had two or three, I believe, and the rest were contributed by me; I brought the show cases knocked down; they had two of those that they contributed and the rest of them were mine; of the two desks one of them belonged to me and one to the others; the office partitions belonged to them; that was in place already and in use; the manikins in the list belonged to me and the cutting shears belonged to me; there were two dozens of those; those six dozen knives are used in a special handle; you insert a knife blade, and when it is dulled you throw it away and put in another; those were mine.

Of the six long tables, I believe I brought in two or three; those machines that I bought in New York were reconstructed machines; I put in those machines that I bought in New York at a higher price than I paid for them in New York because after purchasing them I had to bring them down here, and I had to install them, and run a chance that they might break; they are made of cast iron and easily broken; these prices did not include installation of the machines in the Pumarada factory, that was the price established by us; I don't figure that they cover the cost of installation because I had a mechanic who was paid a salary for the installation and everything; Mr. Wys was the mechanic at that time; the proof of claim that you are showing me only includes insured articles that belonged to Jose Rivera Soler & Company; there was in my establishment, at the time of the fire, a considerable amount of merchandise belonging to houses or concerns in New York; as to whether that was also covered by my insurance policy, if I had wished to make a claim for that, the policy covered it, but I didn't make any claim for it because it was understood that all material that comes from the North is covered by a flat insurance.

[fol. 111] The policy itself says that it covers merchandise that belonged to the Soler Company and also merchandise that it has on consignment, or in trust for other persons, but, for example, there is a house making a claim on us for materials lost in this fire that were not insured, and I could have included that in my claim in this case, but I didn't do it; as to how much was this other merchandise that belonged to other people in my factory and which was destroyed by fire, I would have to make a resumé of the losses incurred by each different house; I could not say; it would not be as much as ten or fifteen thousand dollars; as to whether I ever made an examination to ascertain how much of the merchandise belonging to other people there was in my factory or in the factory of the plaintiff corporation at the time of the fire, I do not know that; I did not do that; I have made no estimate whatever; I have made estimates of the quantities and I have made my report to them, but not as to the value, the letter that you are showing me, addressed to the Handcraft Import Company of New York, under date of March 18, 1932, is signed by me.

[At Mr. Brown's request this letter was marked "Identification No. 4, Defendant."]

I am unable to determine the amount of merchandise, that is, unmanufactured goods, belonging to these concerns in New York that might have been in the factory at the time of the fire; I did not say that I was able to determine more or less the merchandise belonging to Northern houses that was either already manufactured or in process of manufacture or that as to materials that were neither manufactured nor in process of manufacture I was unable to determine; I said that I was not able to establish the value of those articles; I had contracts with these different concerns in New York under which I agreed to manufacture certain styles of clothing and other articles for agreed prices; that is to say, according to these contracts, I would charge or I would be given various prices per dozen for making certain things; some things I would be paid $3 a dozen for manufacturing and other articles other prices as agreed upon; the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; [fol. 112] no, in that item there is included only the price that we collected from the people in New York; that is to say, if my contract price was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozen of those on hand, that $7.50 was insured.

I believe that Mr. Wolf furnished Mr. Hastrup with a copy of this claim that I was making for work on stock; I don't know whether he furnished this or not because those matters were under the charge of Mr. Berrios; immediately after the fire I established myself for my own account and have been working for my own account since that time; as to whether I furnished any detail of this claim for work on merchandise in stock, my bookkeeper would have to answer that; I said that I usually checked up on merchandise that was received by the firm; most of the time I examined it and saw whether it agreed with the invoices; many times they were not checked from the invoice however, they were checked with the goods first, and if the invoice came in the box with the shipment it was then compared with the invoice; otherwise it would have to be checked later when the

invoice came by mail; it was checked some time, of course.

I do remember that in the month of February was made a purchase of a considerable amount of thread by the plaintiff corporation from me personally; I got that thread from New York; the corporation didn't buy it rather than me because that is a business that I always do when I go to New York; I try to get lots of good merchandise, first class quality, and I bring it down either for my own use or to sell; as to when did I go to New York to purchase this thread that I sold to the plaintiff corporation in February 1932, I believe I was in New York in December or in January; I remember that it was very cold; when I went to New York I made these purchases on my own account; and most of the time I sold them to the corporation for a higher price than I paid; I am unable to state exactly how much this thread cost; the last lot of thread I purchased I bought in two different places; from the books there appears to have been purchases of silk and broadcloth made from somebody by the name of Nieva, in Mayaguez, which are for an aggregate amount of something over six thousand [fol. 113] two hundred dollars; that was purchased by the company; I personally negotiated that purchase; I was over in Mayaguez about four times.

As to when was this merchandise delivered, that can be seen from the books; I think it was in the month of February that it was delivered; I bought so much because, as I have explained before, we were starting a new class of business, manufacturing for our own account; we did not always manufacture articles on our own account as well as for others; what we manufactured was from remnants, but we never bought material to manufacture; we manufactured only from remnants; before this time I had never done business with this Mr. Nieva of Mayaguez; he was not a relative of mine; I have known him for a long time in the business; I could not say exactly when I went to Mayaguez; I go to Mayaguez quite often in connection with my business, and over the island in general, as well.

Mr. Nieva sold this silk to the plaintiff corporation, this cloth, on credit, thirty days time; as to how we expected to pay Mr. Nieva for this merchandise, we had a man who had no direct interest in the business, but who had a brother-in-law in the business, who was going to let us have ten thousand dollars for that business, and at the time when

the fire occurred he had already given us almost $2,500; it was more than $2,000; he was giving that money to us as we required it; as to what was he going to get for the money, I don't know if he had any interest, but his brother-in-law was in the business and he was to profit by it; he was just going to lend us the money; some of this last purchase of silk and broadcloth from Nieva had been cut already before the fire; the idea was for me to go to New York with the first lot of these manufactured goods; I had houses already that were interested in it, for instance like the house of Joseph Love; I personally brought a considerable amount of this silk over from Mayaguez in my own car, in two trips; I first bought one lot from him, and afterwards I bought another lot from him.

We had a room in which to take care of this merchandise, and part of it had been cut already; I believe that room was built around in February, about the middle of the month; during the last weeks of that period the business of Rivera Soler & Company had improved very much; ever since December and January it had been very much im- [fol. 114] proved; we did not have more employees working than previously; the number of employees was usually about the same; we had not done more work, we were expecting to do very gradually increased business when we were able to move that material, in addition to the work that came to us from the North. Some of those 36 machines No. 9510 mentioned in the voucher of July 1931 were brought in by Pumerada; there are thirty-eight of those machines; they are more or less the same machine; these others are special machines; those machines Nos. 9510 and 9610 were Singer sewing machines; those I brought in and those Pumerada brought in were more or less the same; the only difference was that the machines brought in by Pumerada were machines that had seen a lot of hard usage, and they were not clean; but they were first-class machines and capable of being put in good condition; I put them in at the same price, that was an agreement between us; not $71.60.

I had to call his attention to the fact that this included the power bench; there are included in that statement sixty power benches which are put in at $19.50; I had some of those power benches; I don't think the sixty power tables should have been excluded there; here we have thirty-six;

the difference between 36 and 60; Pumerada, Escudero and Valloveras had one motor; I don't remember which was that motor; Mr. Wys can explain that; at that time two machines had been loaned to Maria Villeta, at Guaynabo, but those were the personal property of my wife; they were part of that property, but those were not contributed into the corporation; in one lot of machines that I bought there were two family machines with motors, and those were the ones that were loaned to her; they were not Singer machines but Wilcox; those machines that have two handles were brought in by Pumerada; on Saturday morning before the fire there were around one hundred people working in our factory.

I left the factory that day about one o'clock, a little later; probably one-thirty; at one o'clock we started paying off the employees; there were two boys that slept in the building, but downstairs, in the basement; there was no communication between the basement and the upper floors; that was completely isolated; I had a key to the building and I think Berrios also had a key; prior to that time the boys [fol. 115] that slept in the building had the keys of the building, and the key that the boys had was taken away from them and given to Berrios; Berrios was one of the new stockholders that came in in July 1931; he was treasurer of the corporation; as to whether Berrios came into the corporation in July 1931 or February 1932, that appears in the minute book; he was one of the people that bought out Pumerada, Escudero and Valloveras.

The thread that I sold to the corporation in February was bought by me in New York; I brought it down myself as my own baggage; as to whether I declared that for the purpose of excise tax, not precisely with the idea of covering it up, but as a matter of fact I didn't pay any excise tax on it, and even now when I receive thread in that way which comes with other merchandise I don't pay any tax, and they don't ask me for it either from the treasury department; the greater part of it came in packages in my stateroom, and part of it came in a box from the house of Greenberg, New York; that was part of the thread which I had purchased from that same house of Greenberg; in this box that came from Greenberg there were also materials that they sent us; that didn't pay excise tax, the merchan-

dise that comes from there doesn't pay any tax; at that time I lived in Guaynabo; when I left on Saturday afternoon, March 12th, 1932, for my home in Guaynabo, I took one of the boys with me; his name was Antonio, I don't remember his surname right now.

I heard about the fire the next day in the morning at about eleven o'clock; I came over the next morning; I was in the habit of coming in the morning; I did not place any guard there to see that no articles were taken away, when I arrived there at the site of the factory I found a gentleman there, I think he was the insurer of the building, who on his own account had placed a man there in charge to keep an eye on things and he notified me so that I should pay for his services later; I don't know how he was paid; I know he was a peon who was there as a watchman. The two thousand dollars or more that our friend let us have on account of the ten thousand dollars that we were going to get ultimately was used to take care of the expenses of the factory; the name of this friend that lent us two thousand dollars and was going to let us have the ten thousand, [fol. 116] is Simon Rojas; I think he lives in Barranquitas; I don't know what he does; I know nothing about him.

I couldn't buy the silk that I bought from Nieva in San Juan, not that kind of silk; that doesn't come to Puerto Rico; it is not brought to Puerto Rico; it is a silk that is called "unloaded", a silk which is not loaded with lead; it is a silk which is used in the United States for manufacturing purposes; that is a class of silk that all houses use; it is almost standard in the United States among the different people that work with Puerto Rico in that trade, for the New York trade; all houses in Puerto Rico that manufacture silk underwear use that silk in Puerto Rico; for sale here in Puerto Rico in the local establishments, it is not brought in; I received 100 additional shares of stock of the plaintiff corporation sometime in February 1932; as to whether it was in payment of an account that was owing to me by the corporation, I think it was given that form in the books, but the business was that I gave a credit that I had in the books of the corporation for 100 shares of stock of $100 par value, and it was understood that I was to sell all my shares to those who entered in the corporation, up to forty-six shares.

The corporation was owing me around twelve thousand dollars; as to whether that debt was cancelled, there was a small debt standing after that; I believe it was for profits, something like $500, but I don't remember the amount exactly; the corporation was owing me twelve thousand dollars for various things; I have been carrying forward the load of debt of the corporation since it was formed; as to whether I said that I had fifty or sixty shares of stock of the corporation at the outstart, for which I paid machinery and other supplies, that was when my personal business was turned into that of the corporation; the Dolcey deal was after that time; I sold the corporation for $2,300 the machinery that I bought from Dolcey, and then in July 1931 I sold the corporation more machinery for $7,500; that did not make about ten thousand dollars, because I have credited there also some profits, and also thread that I had sold to the corporation, and the profit that I had in the Dolcey deal.

As to whether the day before the fire merchandise was sent out from the factory, that was a daily affair; we did [fol. 117] business daily; on Saturday, it may be that a small amount went out, but as a rule on Saturday we don't send any merchandise out of the place; we devote our time to paying off; the machinery that I bought some time shortly before July 1931, that I had in my house in Guaynabo, and that I sold to the corporation, was bought by me on two or three occasions; I didn't buy it all at once, and I also bought some here in Puerto Rico; in Mayaguez I purchased some ordinary sewing machines; this machinery was special rebuilt machines that I bought in New York, and I bought some up there which were not rebuilt machines either; I am referring to the machinery that I sold to the corporation in July 1931; I am unable to state where and when I bought it; I have machines on hand right now that if you ask me where I bought them I could not tell you; I would invite the jury to go to my house to see if I carry any system of books, and I am doing a big business right now; as to whether I buy machines for a value of $7,500 and don't know where or when I bought them, I have bought them on different occasions.

[Answering questions propounded by Mr. Travieso, the witness further testified:]

Those machines to which Mr. Brown refers in his last question were sold by me to the company, to the plaintiff in this case; they were in the establishment of J. Rivera Soler & Co. Inc. on the day of the fire; those machines were the property of the company; they were all destroyed by the fire; none of them were taken away before the fire by me or by any employee of the corporation; I saw those machines there in the factory for the last time the Saturday morning before the fire, the day prior to the fire; the caseta to which I referred in my replies to Mr. Brown was like a large closet, in which a person could enter; it was like a room, an enclosed room inside the factory; we had to make it because the tables occupied all the corners, and it is necessary to have that near the cutting tables; as we were working that silk and with silk since before that time, we had received many complaints from the North that the merchandise would suffer by reason of being in Puerto Rico, that it was received from Puerto Rico spotted and fly specked, which is the worst thing in the world to get out of silk, and we built that room to store our silk in order [fol. 118] to keep it in a good condition, and also to keep it out of the way of people and to protect it from dust; that closet or inside room is right here [witness makes a cross on Exhibit No. 39a for Plaintiff, where the said room is located].

On the night of the fire there was silk stored in that room; it was silk that was cut, and there was silk uncut and there were manufactured articles made of silk; there was quite a large amount; the silk that I bought in Mayaguez on different trips that I made was there in that closet; it was destroyed, and besides there was more silk in this place which did not belong to me; but it was in pieces; it was already cut, and silk garments which were in that closet and which did not belong to me were also destroyed; they belonged to somebody else; my company is not claiming for this material that belonged to somebody else from the defendant company, we have calculated what we have paid for labor on that; not for labor, but what we collect or charge for labor and for the loss of our silk; I am not claiming from the defendant company the money that I have paid to the employees for working this material; I calculate that when a lot of material is finished, we are unable to charge only what we have paid for the work, be-

cause that is material that is already finished and ready for shipment, and all the overheads are incurred upon those goods, and if for a dozen garments we are paid $24 to make them, I in my calculations put there $24; it may be that I have paid $2 for that, but it is worth $24 to me; I include the cost of labor, the overhead expenses and my profit, the article being finished and ready for shipment at the time of the fire.

[Answering questions propounded by Mr. Brown, the witness further testified:]

There was no broad cloth in that room, all was silk, manufactured and unmanufactured silk, but not silk thread, because that was in another place; that was absolutely all that was in that room; there wasn't anything particularly inflammable in that room; in the premises yes, there were inflammable articles; we had gasoline and benzine there; there was not any of that in that room.

[Answering questions propounded by Mr. Travieso, the witness testified:]

[fol. 119] We used the kerosene for stamping, and we used the gasoline, but not the ordinary gasoline, but a special gasoline, a very strong class of gasoline, for cleaning silk; we buy it from the Standard Oil Company; I purchased a can of it just the other day.

Jose L. Berrios Berdecia, a witness called on behalf of the plaintiff, after having been first duly sworn testified answering questions propounded by Mr. Travieso, as follows:

My name is Jose L. Berrios Berdecia; I need an interpreter; I am a merchant; previously I was in business in Santurce; I had an interest in the corporation Jose Rivera Soler & Company, the plaintiff in this action; I was coowner, stockholder and director of the corporation, and also treasurer; I became a stockholder of the company in the month of February 1932; I acquired my shares in the corporation by purchase from Messrs. Escudero, Pumerada and Valloveras; I bought their stock in the corporation for $2,500; before I became a stockholder in the company I re-

quested an inventory of the company to see whether I wanted to get into the company or not; an inventory was shown to me, that of the year 1931; I did not see any other inventory besides that; I took that inventory and went to examine the property that was there, and I checked to see that everything was complete; it was complete; after doing that I bought the stock of the corporation; in the examination or checking of this inventory I checked the machinery that was in the factory and all of the machinery in the building was shown by the inventory.

That machinery, at the time of the fire, was in the upper floor installed for the work of manufacturing that the factory carried on; none of those machines that I found in the inventory had been removed from the premises at any time prior to the date of the fire; I was there the last time on Saturday before the fire; the fire occurred on early Sunday morning and I had been there on Saturday prior to the fire; prior to the fire I worked in that building, as treasurer of the company; as to a stock of merchandise appearing in the inventory checked by me, after my examination and checking I found that it was correct; no part of that merchandise was removed from the premises previous to the fire, except the natural movement of the place; the [fol. 120] factory was engaged in the work of manufacturing goods; there were about ninety or a hundred employees working in the factory the days previous to the fire; not all of the machines were working; as to where was all the merchandise kept in the premises in the factory, that depends on whether the merchandise was to be cut, or in what condition it was; if it was to be cut it was underneath the cutting table; on the day previous to the fire there was very much merchandise under those cutting tables; those shelves underneath the cutting tables were full of cloth; full up to the top of the space under the tables; there was a considerable amount of merchandise on hand.

After the merchandise was cut it was distributed to the different operators, or taken to the office for despatch to the island, for shipment to the island; the shipment product belonging to the company was stored in the building prior to the fire; on the shelves in the building; at this moment I cannot state the quantity or amount of this merchandise that was on the shelves; that was about two years ago; there was merchandise in process of manufacture, which

means that it is not finished and ready for shipment yet; that was kept in their proper places, on the shelves or hangers; there was a considerable amount of those goods in process of manufacture on hand previous to the fire; there was very little quantity of finished goods on hand; we had just made a shipment on the Thursday previous to our agents in the United States, the people to whom we shipped in the United States; that shipment made previous to the fire was entered in the books of the corporation.

[Answering questions propounded by Mr. Brown the witness testified:]

Before I became associated with J. Rivera Soler & Company, Inc., I was secretary-auditor of the municipality of Guaynabo; I acquired my share in the business by purchasing shares of stock from Messrs. Escudero, Pumerada and Valloveras; I bought fifty shares of a par value of $100 each; we entered into negotiations at the end of January and I purchased them in the first days of February; and one of the first things I did was to look over the establishment and see what was there and in order to do so I asked for an inventory; Mr. Rivera Soler gave me the inventory, a loose sheet, a copy of the inventory; what you are show- [fol. 121] ing me is what was given me as a copy of the inventory by Mr. Rivera Soler; when I obtained this inventory I started to check it; there was an inventory of machinery and of all the property of the corporation; I counted the machines; at that time I knew about machinery as a merchant only; I felt that I had sufficient knowledge of machines of this character to be able to identify the machines that were in the inventory; the inventory stated the different kinds of machinery that were there, it specified Singer sewing machine number so and so.

As to whether I knew when I looked at these machines that they were Singer sewing machines number so and so, I asked, where is such and such a machine, and they told me, these are the machines; Mr. Wolf or Mr. Rivera Soler, the first one that I saw, told me that; when I asked them to show the different articles to me they did so; I examined the articles that were described in the inventory only sufficiently closely to enable me to verify and convince myself that the machines were there and working, and the same with the merchandise; I found everything exactly in

accordance with the inventory; that inventory was made the 31st of December and I made my examination the first days of February; some of the merchandise that was mentioned in the inventory had been shipped, but on the other hand there was merchandise that had come in since then; the inventory did not mention boys' suits or dresses, it mentioned creepers; I found the creepers there; as to whether the inventory detailed any dresses or suits, I do not remember now; the inventory made mention of cloth and of thread; I believe so; I do not remember very well as to that, but I think it did.

If the inventory mentioned thread and it was thread in boxes, I, of course, would count the number of boxes and I would see that they had thread in them; if there was thread mentioned in the inventory I did check it up; I don't remember now whether there was any thread mentioned in the inventory; there were many things in that shop and I don't remember everything in detail at this time; I checked the cloth against the inventory in the same manner; if the merchandise was in pieces I measured it; all the cloth mentioned in the inventory was there; I also went over all the [fol. 122] furniture and fixtures and the office furnishings and implements also, everything, and I found that the number specified in the inventory was there; I did this in the first ten days of February; there was quite a bit more merchandise there than was described in the inventory.

The excess merchandise consisted of sewing thread and silk thread; I don't remember if there was cloth there; I remember a lot of thread that Mr. Rivera Soler sold to the corporation in February; it was there when I made my check-up; I knew he sold it because, upon showing it to me, he told me that it belonged to him; he had not yet sold it to the corporation; he sold that to the corporation later; that thread that belonged to Mr. Rivera Soler was on the second floor, which was called the upstairs office, where there was shelving put around; I did not consider that thread within my purchase; I didn't consider that because Mr. Rivera Soler told me that that was his thread; I believe all the machinery was on the second floor; the last time I was there in the factory was the Saturday immediately preceding the occurrence of the fire.

I told Mr. Travieso that I remember pretty well what was there; there were some goods in process of manufacture;

there were very little actually finished; what had been finished since the preceding Thursday when they made a shipment; the work done upon these finished articles belonged to the house, to the corporation, but the articles themselves belonged to the people to whom shipment was to be made; the work on the finished article belonged to J. Rivera Soler & Company; if there was a dress or a suit of clothes or any other completed article, it belonged to two different parties; the manufacturers who put in the work in completing them, and the owner of the cloth or material which went into the article; finished articles there were very few, but articles in process of manufacture there was quite a lot; as to whether Rivera Soler & Company at that time had a considerable amount of merchandise in the hands of people who worked outside of the factory, I don't know; I knew that much of the work of these various articles was done outside.

People came in to the counter every day and picked out articles and receipted for them and took them away and when they finished them they brought them back; there was a considerable amount of activity to get merchandise and [fol. 123] deliver finished work every day; I have no idea as to the amount of finished work that was turned out of the factory every day; I have no idea as to how many dozen creepers they made there a day; I don't know how long it took to make a creeper, or how long it took to make a boy's pants or a boy's suit; we made shipments every Thursday to the States and every shipment pretty well cleaned up all the finished articles that were in the factory; on the Saturday immediately preceding the fire there were eighty or ninety people working in the factory.

Simon Rojas Negron, a witness called on behalf of the plaintiff, after having been first duly sworn, and answering questions propounded by Mr. Travieso, testified as follows:

My name is Simon Rojas Negron; right now I am a farmer and industrialist; I live in Barranquitas; as to whether I at any time had any dealings or negotiations with Rivera Soler & Company, the plaintiff corporation, in the early days of February 1932, two years ago, my brother-in-law, Berrios, spoke to me regarding a loan which they

needed for certain operations of the business, and the needs of the business, and the prospects of the business, with reference to the Chinese-Japanese War, because it was believed that there would be a great opportunity for Porto Rican work if contracts, instead of going to China and Japan, would come to Puerto Rico; after talking the matter over I agreed to make a loan after furnishing me with an inventory that I required in order to know what the business was, as to the machinery and the stock on hand and so forth; they handed me the inventory and I went to the storehouse and the factory with the inventory in my hand, and accompanied sometimes by Mr. Rivera Soler and on another occasion by an employee by the name of Teodoro or Isidoro, I don't remember exactly which.

I checked up the inventory with regard to the machinery and stock on hand, and that inventory, or a copy of the inventory, I have in my possession right now; I could produce it if it is desired; after I had done this, I agreed to allow them the loan in accordance with the requirements of the business, up to ten thousand dollars at ten per cent interest annually; I opened a credit for the corporation up [fol. 124] to the amount of ten thousand dollars, so that they might dispose of any amount up to that sum of ten thousand dollars, in accordance with the requirements of the business; as to whether they made use of that credit to any extent, I gave them before the fire up to one thousand nine hundred and some odd dollars; here are the checks; these are the checks drawn against the Royal Bank of Canada, payable to Jose Rivera Soler & Company, Inc.; there are six in the name of Jose Rivera Soler & Company, Inc., one to Jose Rivera Soler and one to Carlos del Toro Fernandez; these checks are signed by me and drawn against my account in the Royal Bank of Canada; six of them are payable to this corporation; the total amount of those six checks is $2,450; one of them is payable to Mr. Carlos del Toro Fernandez, for fifty dollars, in payment of fees due by Jose Rivera Soler & Company to Del Toro Fernandez, and the check was made directly to Del Toro Fernandez, but charged to the account of Jose Rivera Soler & Company.

Mr. Del Toro Fernandez is a lawyer and those were for attorney's fees for services to the corporation; no security was given to me for the repayment of that money that I

loaned to the corporation, because it was a deal with my brother-in-law Berrios, with whom I was related, and I agreed with him that he should keep me well informed as to the needs of the business, and that if the money requirements were greatly needed that he should represent my interests in the company; at the time that I made this inspection of the factory and checking of the inventory, I saw machinery there, motors, manufactured and unmanufactured merchandise, furniture and other effects which are noted in this inventory which I have in my hand, and which I checked; the factory was working at that time; the first day that I went to the factory there were about eighty or ninety employees; some women were working on the machines on the second floor; some were working on the lower floor, cutting and ironing and sewing, and others were doing general work about the factory, and in the basement there was washing and other work done; that was the first time that I made the inspection of the factory; I went there frequently, at least once a week; I was going there from time to time because I had put my money in there and I [fol. 125] was taking an interest in it; I was watching my money to see whether it was properly invested; I considered that the operation of that factory was the security for my money.

[Answering questions propounded by Mr. Brown the witness further testified:]

This copy of inventory was delivered to me there in the office; we were all there in the office, in Mr. Rivera Soler's office; but it seems to me that the person who actually handed that to me was Mr. Rivera Soler, although I am not really sure as to that; that was in the first days of February 1932; my brother-in-law Berrios was already a stockholder and treasurer of the company, or rather, I should say, they were putting through their deal; I don't know altogether of their private business; it was some time in the first part of February 1932, that is two years ago; it was in the first week because the first check I issued to them was dated on the 6th of February and it was the day after agreeing to lend them the money, and this was the check, I understand it was to pay the operators on that day; I must have gotten this inventory and checked up against it before the 6th of February; as to whether I

can leave this copy of inventory here, I understand that is a document that belongs to me, but—that is a copy of the original inventory which those gentlemen have.

[At Mr. Brown's request this copy of inventory was marked "Identification No. 5, Defendant".]

Upon obtaining this inventory I commenced to check and find out whether the articles mentioned in the inventory were there; I checked up on the machinery; there were some things there in the inventory which were in their original packages, and I didn't pay much attention to those; I checked the machinery especially, but I also saw that the effects mentioned in the inventory were there, the new merchandise and other merchandise in general; I did check the furniture against the inventory, and the merchandise; the only thing I didn't do was to open packages; the item in that inventory called "materials de elaboracion" is material for manufacture, composed of thread, there are quantities of thread mentioned there, and they took me to the place in the upstairs part in a room where the thread was, and they opened the show cases and I saw there was [fol. 126] a quantity of silk and other thread, and they took me downstairs and showed me another place where there was thread; and there are mentioned on the inventory a certain number of pillow cases, and they would take me to the place where the pillow cases were, so many cases of pillow cases, for instance; I did not count the amount of thread there was there nor the amount of boxes and spools of thread; spools of thread are small and there are very many of t m; I didn't count them package by package, but I noticed that there were many packages of them; I have been a merchant over twenty years, and I know that roughly the quantity before my eyes represented more or less what was called for in the inventory; I saw a lot of pillow cases and children's clothes and a lot of cloth of different kinds, and furthermore I even purchased some linen sheets for my house from them; I purchased from them first about $32 worth, and later I made a larger order, which they did not send to me; I looked over the cloth that they had there; I didn't check to ascertain just how much cloth there was there; after that I visited the factory about once a week; before becoming a farmer I was a merchant in Venezuela; I was established once in Colombia also, and

in Chile and Peru and Bolivia, as attorney in fact for Scott and Browne of New York, and in accordance with this power of attorney which I have here:

I was engaged in the purchase of coffee but not of coffee alone; I was in general business there and also had to do with the purchase of coffee; I came to Puerto Rico in 1923, after having been in jail for 93 days and having all my property confiscated, in Colombia, on the frontier of Venezuela. I know what the attorney is driving at, so that is why I make the statement; you are alluding to my reputation; I now reside in Barranquitas; right now I am engaged in agriculture; the only thing is that at present I am not planting anything, my business is tobacco and tobacco is bad; I do not have a farm in Barranquitas, my father has and I cultivate his farm; at the time of that business in 1932 I was living in Barranquitas; in February 1932, when I first became interested in Rivera Soler & Company, I was engaged in agriculture, just as I am today; the fact that I do not plant right now does not mean that I am not a farmer; besides this farm in Barranquitas, I own the house where I live.

[fol. 127] I did not make any income tax returns for the year 1931-1932; at that time I had a concrete house which I myself built, and a small lot, that is all; at that time when I built that house my family was still in Venezuela, at the time when I made up the tax return. This money that I was going to lend to Rivera Soler & Company was mine and that of my wife; I had disposable over ten thousand dollars at that time, and even more than the ten thousand dollars, because in the same month I loaned Mr. Rivera Soler on a mortgage $5,000, and the checks for that are here also, and the mortgage deed is registered in the Registry of Property here; here are the checks; my capital was usually in cash, ready to do business, and fortunately due to that I was able to save myself due to this banking crisis; at that time I had money in the bank and also in my home; because I was in the habit of getting money in considerable quantities from the bank and taking it home and keeping it on hand for any purpose that might present itself; here is proof of that, these checks drawn to myself.

Mr. Travieso: In order that the record may show a complete answer, I would like to see those checks that the gen-

tleman exhibited, and have the record show that he exhibited a number of checks.

The Court: I think it appears in the record that he made so many checks on the bank, and the bank record shows that.

The Witness: I brought all these checks because I was brought in here yesterday as a witness and I was informed by a friend here in court that you had placed my reputation in doubt; I was interested in showing the gentlemen of the jury that I have been and am now a man of excellent character; nobody told me that you had attacked my reputation here in court; the question of Mr. Brown was as follows: Do you know the reputation of this man, Mr. Rojas?

SEBASTIAN SOLO, a witness called on behalf of the plaintiff, after having been first duly sworn, answering questions propounded by Mr. Travieso, testified as follows:

My name is Sebastian Solo; I am a resident of San Juan and I am a broker, a commission agent, exclusively in rice; I am acquainted with the corporation Rivera Soler & Company, Inc., plaintiff in this action; I used to know the fac- [fol. 128] tory that this company had here in Santurce; I was there a number of times; I was there the last time in connection with some life insurance which I tried to get Mr. Rivera to give to Mr. Saldana, who was an insurance salesman; I did not exactly go there to the factory to try to sell this life insurance to Mr. Rivera Soler; I told Mr. Saldana that Mr. Rivera was interested in taking out life insurance, and that was the cause of Mr. Saldana on various occasions telling me ~~to~~; I went to the factory with Mr. Saldana, who went there to sell life insurance, and after they made the insurance policy which I was interested in, then Mr. Saldana began to talk to Mr. Rivera about other insurance; he tried to get the insurance on the establishment of Mr. Rivera Soler.

What I saw in the factory is that as a result of the negotiations for the insurance, while I was there with Mr. Saldana, I had occasion incidentally to see the factory and machinery and stock on hand, more or less; I believe Mr. Saldana was agent for a fire insurance company; he did

write the policy covering that factory; at the time I was there with Mr. Saldana the factory was in operation; I wouldn't dare to say the number of employees that I saw working in the factory; I know there was a considerable number of people; it was quite a large factory; I think, calculating very conservatively, there must have been more than fifty people there working, because the place that I saw there was a large shop with long tables; there were many machines working; according to my understanding the factory was working normally.

I saw something of a stock of merchandise; I don't remember the date when I was there with Mr. Saldana, but I think it was around the last of the year, either in the last days of December or early in January, just two years ago, in 1932; I saw machinery in a room which I had never seen before; that room was upstairs, it was a two story building; we were up there some time looking at the machinery, and there were two motors, and when the motors were working all the sewing machines in a row right to the back of the room were able to work simultaneously; I went up with Mr. Saldana and Mr. Rivera; I saw in the lower part, after passing back of the office, many many boxes; these [fol. 129] were tables, very large tables, and there were packages and materials for blouses and other materials on the tables.

There were covered packages underneath the tables the contents of which I did not see, and besides there was material on top of the tables as well; Mr. Saldana saw it all because they were discussing the amount of the policy; that discussion took place in my presence; I don't remember the amount that they agreed to insure for, but I remember perfectly well that Mr. Rivera wanted a small policy and then Mr. Saldana showed him or argued that he should insure everything and have full coverage, because if he didn't have full coverage and a fire should occur he would be out of luck; I did not have occasion to visit that factory after that date; I have absolutely no interest in the outcome of this litigation; I am not a stockholder in Rivera Soler & Co. Inc. and I am not a creditor of the corporation.

[Answering questions propounded by Mr. Brown the witness further testified:]

I don't know to whom belonged the merchandise that I saw there; I did not know anything about Rivera Soler &

Company's business; I am in the rice business; as to whether I knew that Rivera Soler & Company had large amounts of goods sent them from the States for manufacture that belonged to the people that sent them, I know that Rivera Soler for many years has been in that business; I do remember a conversation with Mr. Manuel Y. Saldana and Mr. Rivera Soler; as to the details of the policy, I know absolutely nothing; when Mr. Saldana tried to get the insurance they talked of machinery and materials and what was in the establishment, including furniture in the office and everything, but how it was finally fixed up I don't know; I never saw the policy; I don't know a word of what the policy says.

Teodoro Rodriguez, a witness called on behalf of the plaintiff, after having been first duly sworn, answering questions propounded by Mr. Travieso, testified:

My name is Teodoro Rodriguez; I reside in Santurce; I am a cutter; I was employed by the corporation Rivera Soler & Company as a cutter; I was employed by them for about ten years; I was in their employ at the time of the fire that destroyed the factory; I was there the day before [fol. 130] the fire, and every day previous to the fire; I worked every day from eight until five, as usual; the fire occurred on the 13th or the 12th of March, I think it was 1932; I was the cutter, I cut the materials; I was alone in charge of that cutting operation; they would turn over the material to me, and they would instruct me to cut it up, and I would cut it up; the factory was working on the day before the fire; on that day not quite as many employees were working as usual, because it was Saturday and there are always a few less on Saturday; on the days before that Saturday there were about seventy-five or eighty women working there; during those days there were working about fifty or sixty; the rest of them were stopped; one person handled one machine; there are three power tables and supervisors for each power table.

On the days previous to the fire the three power tables were all working; there were twenty or twenty-five machines that were in good shape, but those were not working; there were a hundred and odd machines; something over a hundred altogether; all of these machines were in

the factory the day of the fire; they were on the second floor; none of those machines were taken away from the factory before the fire, they were all there in their places; I was in charge of cutting the material and I was there the day before the fire; that day before the fire was a Saturday and I left as usual about one o'clock; that Saturday morning I worked in cutting material, and there was a layer of cloth on the table laid out ready to continue on Monday; I don't know exactly what quantity of material was in stock in the factory to be cut and manufactured because they were the ones that checked it over to me when it was ready to cut; as to where was the material kept, there is a shelf under the tables, a wooden shelf, and there it was kept and some of it was up on shelves.

There was material under the table when I left the factory; and the laying that I had cut that morning I put under the table, and there was other material there also in the place; I could not tell the quantity of material that was there; there was quite an amount there; after I cut it — went to the machines for manufacture; it went to the stamping table first, and from there it was taken to the machines; I stayed on the ground floor all the time; when [fol. 131] the manufacturing process was ended the finished product went to the shipping department; I don't remember when was the last shipment made, I think it was Thursday of that week, and in that shipment they sent out the goods that were ready to be sent to New York.

[Answering questions propounded by Mr. Brown, the witness further testified:]

My work was on the ground floor, and the machines were upstairs; the merchandise was delivered to me to be cut and then it was sent from there to the machines; it came to me cut and uncut; some of it came already cut, and others uncut; Mr. Rivera and I laid the cloth on the table and cut according to the pattern; as to whether some of the cloth came already cut, no, not already cut; what came to me was the cloth that I was supposed to cut; some material came already cut; the silk goods, to avoid dust falling on it, were kept in a sealed room; the goods already manufactured were kept in the shipping room, to be shipped the

following Thursday for New York; the shipping room was on the ground floor of the building.

I can cut one pattern in one day and start another; I don't know how much cloth could I cut in the course of a day; it depends on the thickness of the laying of cloth, piled up on the table; Mr. Rivera Soler did not cut; I was the cutter; he would make the original markings; that would be made between the two of us, but I would do the cutting; I was the only cutter; when it was a machine with an upright knife I could cut three to four inches; on this floor there was the ironing department, the shipping department, and the outside work department; the counter was there on the first floor, where it was given out and delivered, and the office was also on the same floor; I think there were about seventy-five or eighty employees working on Saturday, the day before the fire.

[Plaintiff rests.]

MANUEL PUMERADA, a witness called on behalf of the defendant, after having been first duly sworn and answering questions propounded by Mr. Gonzales, testified:

My name is Manuel Pumerada; I reside in Santurce; I am an employee for the Porto Rican American Tobacco [fol. 132] Company, for whom I have worked for about two years; I did have connection with the corporation J. Rivera Soler & Company, Inc., we were in partnership; we made a partnership with Mr. Jose Rivera Soler, Mario Escudero, Ricardo Valloveras and myself, and the three of us contributed to the partnership $5,000, and Mr. Jose Rivera Soler also had $5,000 in the business; this contribution of capital was in July 1931; we put in machines and some implements and equipment to a value of about $2,000 and put in $3,000 in money; they are sewing machines and cutting machines; we had that machinery in my father's building before we brought it into this business with Rivera Soler; that building was located at Pumerada Street, at Stop 42½, Santurce; we bought that machinery from A. B. Z. Inc., some name like that.

That deed No. 29, executed at San Juan, Puerto Rico, on the eighteenth day of April, 1931, before notary Heriberto Torres Sola, was the mortgage deed which we made

upon the purchase of those machines; the machines described in that instrument are the ones that we bought from this A. B. Z. Company and they were in the shop; those machines were already installed in that building in Pumerada Street, the building belonged to my father; those are the same machines that I brought into the business with Mr. Rivera Soler when we made this transaction that I am talking about; there were some folding chairs which were described in the deed; they were eighteen or twenty and there was a motor to run the machinery also; that is described in the deed also, and there was a cutting table that we made; this table was made after purchasing the machinery; it was a wide table about five feet in width and it extended the whole length of the building on one side.

After we acquired that machinery the only additions that we made to that shop was the table and the electrical installations which were made; in July 1931 I made this deal with Mr. Rivera Soler whereby I brought in this machinery for $2,000 and $3,000; Mr. Rivera Soler had another partner, Adolfo Lopez, who had $4,000 in shares of the corporation, and Rivera Soler had $6,000; we bought the $4,000 that Adolfo Lopez had, and also $1,000 from Rivera Soler, in order to make the two groups even, with $5,000 each; we were supposed to get fifty shares between [fol. 133] our three people; of a par value of $5,000, in Jose Rivera Soler & Company; as part of these $5,000 we turned over this machinery that is described in deed No. 23, and also the electrical installation that we had made, this table that we had manufactured and other small things; we agreed on that value of $2,000 with Jose Rivera Soler; this deal was discussed with Jose Rivera Soler.

[Mr. Gonzalez offers in evidence a certified copy of deed No. 23, executed before notary public Heriberto Torres Sola on the 18th of April 1931, for the purpose of showing what machinery was brought into the corporation, and the same is admitted and marked "Exhibit No. 1 for Defendant."

By stipulation agreed to verbally in open court, the translation of the document Exhibit No. 1 is limited to a list of the machinery and equipment and the prices, contained therein.]

After Mr. Valloveras, Mr. Escudero and myself acquired shares in Rivera Soler & Company I became treasurer of

the corporation; I did know the establishment run by Rivera Soler before the sale of this machinery to him; it was located at Sagrado Corazon Street; we discussed this deal that we made with Rivera Soler & Company Inc. with Rivera Soler himself; we visited his establishment in Sagrado Corazon Street on various occasions; we visited Mr. Rivera Soler's home in Guaynabo; after the machinery was transferred by us to the corporation J. Rivera Soler & Company, Inc. the shop that was owned by J. Rivera Soler & Company was all moved over to the building where our machinery was; after the shop of Rivera Soler was moved from Sagrado Corazon Street, over to our shop in Pumerada Street, we had eighty-six machines in this shop.

The difference between these eighty-six machines and the machines that we turned over to J. Rivera Soler & Company, which we had acquired by the deed Exhibit No. 1 for Defendant, is what Rivera Soler contributed; he brought them in there from his shop; Mr. Rivera Soler did not bring any machines from his home in Guaynabo; I am sure of that; that these different times that we were discussing the business or deal with Rivera Soler, he never told us that he had machines in his house that he wanted to bring into the business; on the different occasions that we [fol. 134] went to his home in Guaynabo to discuss this business, he never mentioned to us that he had such machines nor showed them to us; I have never seen them; we purchased the shares in the corporation J. Rivera Soler & Company in July 1931 and sold in February 1932; I was treasurer of the corporation during all that time; the only thing I did was to go there and see how the business was going on; I went there sometimes at night; I very seldom examined the books of the company; I had occasion to look at the books; we discussed the business with Mr. Rivera Soler; I don't remember ever having seen that document "Identification No. 3 for Defendant."

Mr. Rivera Soler personally did not sell any machinery or furniture to the corporation at the same time that we did; I never heard of a sale by Mr. Rivera Soler of machinery and fixtures to the corporation with a value of $7,869.92; no machinery was brought into that shop after the deal that we made with Mr. Rivera Soler on July 13, 1931 nor until we left the company in February 1932; I don't remember having seen an inventory of the properties

of this corporation during the time that I was treasurer thereof; I never heard of an inventory having been taken; during that time that I was treasurer of the corporation I never heard that the corporation owed Mr. Rivera Soler the sum of twelve thousand seven hundred and odd dollars; as to what I know about any debts between Rivera Soler and the corporation, the debt appeared, but it was a small one; I am not sure if it was a debt or a small profit that was due him; it appeared in his personal account current in the books.

That account current appeared in the books of the corporation; the amount of this credit or debt that I have mentioned was something around a thousand dollars, or a thousand two hundred dollars; Mr. Rivera Soler never stated to me that the corporation was owing him over twelve thousand dollars; Mr. Escudero, Valloveras and myself sold out in February 1932 for $2,500; Rivera Soler did the business with Simon Rojas, and also there was a gentleman by the name of Berrios; I do not remember who paid those $2,500; Mr. Rivera Soler secured these purchases for us; in July 1931 we purchased these fifty shares with a par value of $5,000 for $2,000 worth of machinery and $3,000 in cash, [fol. 135] and in February 1932 my associates Escudero and Valloveras, and I sold these fifty shares for $2,500; the reason was that we had invested $5,000 in the business, and the business needed more money and it did not develop as we had expected it to develop; as to what was the financial result of the business of J. Rivera Soler & Company, Inc., during the time that we were connected with it, all I can say it that we put in $5,000 and that it needed more money.

No profits developed, and we had had some differences with Mr. Rivera Soler in the business, and we decided to sell out; that was a needlecraft shop and contracts would be made with houses in the United States; they sent materials, the cloth, and we did the work, and that was the business; we never bought any materials to manufacture for our own account; small quantities of this material that we received from the United States would be left over after complying with the contracts; not very much; while I was treasurer of the corporation I never knew that these overages that I have mentioned amounted to over $3,000; I never knew of these overages amounting to $5,000 while

I was there; it seems to me that there was a small account in the books of the company stating the overages; I do not remember the amount of that account; two hundred or three hundred perhaps.

Jose Rivera Soler was in direct charge of the business; he never told me, while I was connected with the corporation, that these overages amounted to over $5,000; I never saw stored in this factory sobranted (overages) amounting to over $5,000; during the time that I was with J. Rivera Soler & Company we bought thread for sewing and embroidering from a house in Mayaguez callled Sucesores de Blanes; the company never bought thread from Mr. Rivera Soler personally; while I was connected with this corporation J. Rivera Soler & Company, Inc., I never saw any large amounts of thread stored in the warehouse of J. Rivera Soler & Company, Inc., there was never any large quantity there; I did visit an office that there was in the second floor of the business establishment, where the machines were; there was no large amount of thread stored there; there was thread there, but no large amount; I could not state [fol. 136] how much there was; I don't remember; there was never $2,000 worth of thread there; I don't know anything about Mr. Rivera Soler bringing from the States, as baggage, over $2,500 worth of thread while we were partners, or that he sold this thread to the corporation; I know Mr. Berrios by name; I never saw the thread with a value of $2,300 mentioned in the inventory of December 31, 1931; I never saw the thread with a value of $2,500 which Mr. Berrios testified was stored in the office of the second floor of the factory and which belonged to Mr. Rivera Soler personally; I am not sure whether I ever saw the book Exhibit 4 for Plaintiff; I don't remember whether I ever saw an inventory book of the corporation; I was never asked to sign any inventory of the corporation nor anything in that book; while I was connected with the company I never took any part in the taking of any inventory; all the machines that J. Rivera Soler & Company, Inc. had in its shop in Sagrado Corazon Street were brought over to the shop that we had in Pumerada Street; I believe Mr. Rivera Soler informed us that there were six or eight machines over, which were in Guaynabo; as to whether I think that or am sure of it, I am stating that he told us; we never were able to check up on that; he told us the name of a lady

in whose care were the said machines, a lady by the name of Antonia or Maria, but I don't remember her surname; I don't remember whether he told us why those machines were in Guaynabo.

On March 13th, 1932, I lived in front of the shop; I saw the fire that occurred in that establishment; I lived opposite the factory and I was listening to a Lucky Strike program on the radio at that time; the period ended about twelve o'clock when Walter Winchell was on the air, and it was about twelve fifteen or twelve thirty here, and about twelve forty-five we heard some shots and some yelling, and I looked out through the blinds of my room, which is opposite the shop, and I noticed that through one of the windows there was smoke coming out; I dressed quickly and ran over to the building. I opened the main door into the place, but the fire had attained considerable headway already; I opened the door to see the fire and see if I could put it out; the door was locked, I had to force it open; when I opened the door the building looked like a volcano, flame [fol. 137] and smoke; I could not enter; the volcano was in the center of the building; for instance here is the warehouse, and I speak of the center of the warehouse; I refer to the first floor.

When I saw that the fire was too far advanced for me to do anything, I hooked up a hose and began to throw water on my house to protect it; when the firemen arrived there the first thing they did was to try and protect my house, which was the only thing to do because the shop was burning up; I don't remember how long that fire lasted, because when I saw that the house was in danger, my house I mean, I started to get out my furniture, and I got out my wife, who was sick; after the fire I think there was a watchman there; the building where this factory was located belonged to my father; it was destroyed by the fire; the building was insured and we collected the insurance.

[Answering questions propounded by members of the jury, the witness further testified:]

The first evidence I had of any disturbance was some shots; I suppose it was a policeman, who was passing that fire, who fired some shots, and then some people who were passing in the street; when the firemen arrived they placed

two hose, one stream on the fire and one on my house to protect it; they did try to put out the fire in the factory; I don't remember how long it was from the time that I heard the shots before the firemen arrived.

[Answering questions propounded by Mr. Travieso the witness testified:]

This building, which belonged to my father, where the factory was located was a concrete building, the walls were of concrete, but the floors were of wood; it had a zinc roof; there were no interior walls there; it was all one big room on each floor; during the time that I had an interest as shareholder in the corporation I was employed with the Congress Cigar Company; I worked in the office, kept regular office hours and had to go to the office every day; that was my main business, where I made my living; this investment that I had made with Rivera Soler & Company, Inc. was a joint investment with a couple of friends to put in an amount of money in there; I was not paying strict attention or daily supervision to the business of the plain-[fol. 138] tiff corporation; some nights I went to visit the factory; that was when the factory was not working.

When I went there it was to talk with Mr. Rivera Soler or somebody else about the business in general; I looked over the books to see what the volume of business was, and the expenses; the books did satisfy me, but not the business; the company was not making money, it was in need of working capital; when I examined said books I did not find anything improper or that attracted my attention or made me protest; the books were all right but they were not kept up to date; generally they were well kept; they satisfied me that the system of bookkeeping was regular and proper; I was there watching over my investment, my money; I cannot state positively whether the exact number of machines was 86; it might have been 85 or 86; those were sewing machines; in our shop there were two power tables or banks of machines, and each bank had 36 machines on it; that's 72 and I think there was a small power table or bank of fourteen *of* fifteen machines.

I figure altogether there were about 85 or 86 machines. They were not installed in the building; that was when Rivera Soler moved and brought his machines over to our

shop, and altogether it made up that total number of machines; as to whether altogether I saw in the factory before the fire 86 machines, I did not see them before the fire; what I mean to say is that after we sold out we didn't go back there any more; after the sale of our interest in the business we did not go back to the factory again; we made the sale on February 5, 1932; I don't remember having gone back to the factory again after February 5, 1932, and up to the date of the fire; I would not be in a position to testify as to what was inside of the building between the dates of February 5th and March 13th, 1932; I don't know what changes or what improvements were made in the business after we sold out our interest in the business.

[Answering questions propounded by Mr. Gonzalez, the witness testified:]

Those machines that were in the factory, while we were connected with the business, were second-hand machines; the machines that were put in were in quite good condition; [fol. 139] the ones that were brought over from Sagrado Corazon Street were all right; perhaps not all of them were in good shape, but the greater part of them were; they were all second-hand machines.

[Answering questions propounded by members of the jury the witness testified:]

Jose Rivera Soler had a partnership with Adolfo Lopez; Adolfo Lopez had $3,000 in shares and Jose Rivera Soler had $6,000 in shares; we agreed to buy, and we did buy, from Adolfo Lopez his shares, but Adolfo Lopez owed $2,000 to the corporation; we bought therefore from Adolfo Lopez with a discount; we actually put into the business $1,600; we paid that money to Adolfo Lopez by check; by personal check; I don't know if we have that cancelled check, I don't remember; I am not sure whether it was myself or one of the other two partners with me who made that payment; I was the treasurer of Rivera Soler & Company, Inc.; I know more or less what the duties of a treasurer of a corporation are; I never, as treasurer of the co-poration, make any demand to exercise control over the cash book of the corporation; I never made any demand to check the balances of the books against the actual stock of the corporation.

We bought $4,000 worth of shares belonging to Adolfo Lopez; we got in all $5,000 worth of shares; we bought the other thousand dollars worth of shares from Mr. Rivera Soler; there was a transfer; he was credited with $1,000 and he then gave us the ten shares; I think Adolfo Lopez was owing around $2,000 to the corporation when we bought the shares; that debt was charged to us when we bought the shares; we took over that charge; that is the reason we gave a check to Adolfo Lopez for $1,350 and $1,600 which entered into the partnership; that is $3,000 and the $2,000 worth of machinery, and that is what we put into the corporation; we paid to the corporation in cash $1,600 besides the machinery, and you must remember also we paid $1,350 to Don Adolfo Lopez.

[Answering questions propounded by Mr. Travieso, the witness testified:]

We got $2,500 for our stock; my loss was fifty percent; our machinery that we turned in was worth $2,000 and we paid $1,350 to Adolfo Lopez; $2,000 and 1,350 is $3,350 [fol. 140] but we paid $1,650 to the corporation; we gave Rivera Soler & Company a check for $1,650; we invested altogether $5,000.

JACINTO VILLASEDA, a witness called on behalf of the defendant, after having been first duly sworn, answering questions propounded by Mr. Gonzalez, testified as follows:

My name is Jacinto Villaseda; I reside in Mayaguez; I am an internal revenue agent for the Mayaguez district; I know Mr. Pedro Nieva; as to whether Mr. Nieva has declared for the purpose of taxation or has paid any tax on sales of broadcloth and silk to the corporation J. Rivera Soler & Company, Inc., of San Juan, Puerto Rico, during the month of February 1932, at that time I was working in Arecibo; I have examined the records of my office and have found nothing about taxes paid by Mr. Nieva.

Mr. Travieso: Your Honor please, I am going to object to witness testifying as to his recollection of the record. The best evidence would be the record itself.

Mr. Gonzalez: If there is no record, how can there be a record brought in?

The Court: If they kept any records, they can be brought in and they will show for themselves whether there is a declaration or not. Witness is not able to testify what the record shows or does not show. Produce the record and it will show for itself.

Mr. Brown: Your Honor please, we would like an exception. I don't care to argue, but this is a public officer. He says there is no record of any sale by this man Nieva to this company.

The Court: Well, his record, of course, if produced would show that, the lack of it, and would show that if the goods came in they were smuggled and that the tax was not paid.

Mr. Brown: I don't think your Honor understands the excise tax situation. Sales of this character in Puerto Rico are subject to a local insular excise tax. The person making the sale has to declare it and pay the tax, and stamps are attached. It is not a question of importation. It is a question of local sales, and this witness as the officer in charge of the Internal Revenue office in Mayaguez has all the declarations of merchandise upon which the tax has been assessed. He searches those declarations to find [fol. 141] whether there were any declaration of any sale, or any tax paid on a sale of silk or any other cloth by Pedro Nieva, of Mayaguez, to J. Rivera Soler & Company, Inc., the plaintiff corporation in this case, and he says there wasn't any. Now I understand your Honor holds that the answer should be stricken, or is incompetent.

The Court: Yes.

Mr. Brown: Will your Honor save us an exception?

The Court: What I hold is if a record is kept of the transaction, the record should be produced, and if it shows no record then that is something that appears from the official record that is kept.

Mr. Travieso: Your Honor please, I move that the answer of the witness be stricken from the record. The witness testified that at the time and on the dates to which these purchases relate, he was not internal revenue agent in Mayaguez, but he was at Arecibo, so that the original entries in those records were not made by him. He was not in charge of the office, and his reply, to which I objected, if it is in the record, I would like to have it eliminated.

The Court: If it is an official record and one required by law to be kept and he is now in charge of that office, even

though he did not make the record himself, it is competent.

The Witness: As to what record does the Treasury Department of Puerto Rico retain, with regard to this excise tax business, and what form of sales are subject to excise tax in Puerto Rico; linen, for instance, pays two percent tax; a person pays that tax in the form of revenue stamps, and the original sales declarations are kept in the office of the revenue agent for one or two days; a copy is held by the importer, and those sales declarations are sent to the department; the department is in San Juan, and the whole record is kept in that office; that is the original declaration; we leave no record at the local revenue office of this declaration, because the person is paying the tax when he is selling the goods; the only record of a payment of a tax on merchandise is the declaration of a merchant with the cancelled stamps, which ultimately goes to and is kept in the Treasury Department here in San Juan; the local internal revenue agent retains no evidence of this transaction.

We have a file for every merchant; if the merchant owes [fol. 142] something to the Treasury Department we have a record of the debt; we have to report every month to the Department the debts of each merchant, if he owes something; every month we receive about 130 or 140 declarations; it is only where a tax is owing and has not been paid that we have any record there in the Internal Revenue office in Mayaguez; when the merchant owes us anything, we keep a record of it; outside of that we do not keep a record; they have to make monthly payments; once it is paid we have no further record of it; we have the name of every person that pays taxes; we have the record book of that; as to whether the record that I have consulted, that I have been speaking about, is that record, we have a file for every merchant; the Treasury Department did not at any time charge me with the collection of a tax on a sale of silk or broadcloth by Pedro Nieva to Jose Rivera Soler & Company, Inc.; a sale during that time I do not know about.

I have not, since that time, been asked to collect any such tax; if a person or a merchant in Mayaguez has paid a tax at any time in the year 1931 or 1932 the name of the person and the number of the book in which he makes the payment would appear in this list that we keep in my office; all the books are numbered; we keep the name and the number of the book in which he made a payment; I can produce this

book in which the names of any persons paying taxes in the year 1932 in Mayaguez appear; if I can go back to the office; those books are kept by the year; I think I can produce the books corresponding to the year 1932; I have been there in Mayaguez only six months and the records were kept by the other fellow; the official records are kept there; as to whether there is a book corresponding to the year 1932, in which appear the names of merchants paying taxes, it should be kept in the office; the book should be there.

I am carrying on the book for the current year; from this record I can ascertain whether a certain person made a declaration and paid excise tax in a certain year, in Mayaguez; I examine the record and can tell you if Jose Garcia paid in the month of February 1932, because if he paid the record shows the name of the payer, the amount of the payment and the date when it was paid; as I have told you, I [fol. 143] have only been in Mayaguez six months, and I only carry my current book; I don't know where the others are; nobody asked me for information about this record; the Treasury Department did not charge me with any investigation; the Treasury Department merely sent me a copy of a letter sent to Pedro Nieva by the Department; the letter required Nieva to pay a two percent tax on certain merchandise in 1932; I don't remember the date of that letter, but Pedro Nieva went to my office on Tuesday with a letter and asked me what it was all about; he asked me what tax that was, and as I was not in charge of that district at that time I told him I didn't know anything about it, that I was working in Arecibo at the time.

[Answering questions propounded by Mr. Travieso, the witness testified:]

I have been internal revenue agent for the government for about nine years; I am familiar with the process of collecting this sales tax of two percent; as to what sale is that tax collected on, I will give you a case: suppose I go to the United States and I buy merchandise and import it into Puerto Rico; it is my duty to declare that merchandise to the internal revenue agent for the payment of the tax; when the sale is made the tax is collected; if a merchant, after importing merchandise and declaring it, makes a sale to Mr. Nieva, or somebody, then the merchant pays the tax; if the man who purchases the merchandise from the mer-

chant sells to a third party, he does not have to pay any other tax; you pay the tax only once, the first time; on the first sale; merchandise that is brought to Puerto Rico for purposes of manufacture and reshipment back to the United States is not subject to the payment of a tax; it is for re-exportation and it doesn't pay any tax; silk and broadcloth that is brought from the United States to be converted into underwear or garments and to be reshipped to the United States is not subject to the two percent tax; maybe that is the reason why it does not appear in my records, the tax paid upon silk and broadcloth sold by Mr. Nieva to this corporation; I don't know; it may be a legal reason within the law, in that case.

[Answering further questions by Mr. Brown, the witness testified:]

While merchandise that is sent here to be manufactured [fol. 144] into something else and shipped back to the United States is not subject to tax, if any of that merchandise that is brought in here is sold in the island, it has to pay a tax. If A sells to B some merchandise and the former pays the tax, then B does not have to pay any tax; if a sale is made by B and the government doesn't know whether the tax has been paid, in that case B has to demonstrate that the tax was paid; we have to make many investigations; in many cases we found that the tax had been paid; sometimes we find that the law has been violated, that there have been sales made without payment of tax; when I make out the receipt for the payment of the two percent I only make two copies, original and duplicate.

Antonio Catinchi, a witness called on behalf of the defendant, after having been first duly sworn, answering questions propounded by Mr. Brown, testified as follows:

My name is Antonio Catinchi; I reside in San Juan; I am employed by the Singer Sewing Machine Company; I have been employed with that company for nine years; I am the manager of the manufacturing trade division; I have personal knowledge of the sales made in San Juan by the Singer Sewing Machine Company; we sold twenty-six machines style 96-10 on January 28, 1928, to Dolcey & Company; those machines were afterwards installed at Rivera

Soler's plant; those machines were completely new at the time; at that time the market price of those machines was $51.25 each, plus two percent tax; that price did not include what they call "bancadas" or power tables, only the head; each machine is composed of the machine head, the power bench and the electric motor; sometimes there is an electric motor for each machine; that depends upon the customer; if he wants an individual drive we sell a motor for each machine, and we have the group drive with one motor for all the machines.

Sometimes we use a motor for each machine if we have a bank; the power table, the electric motor and the spool holder form part of the machine; the transmission is a part of the power table; we supply iron bearings with the machine, but we have ball bearings and if the customer wishes to use ball bearings we sell them separately; they come equipped with the iron bearings; the shaft, or what they [fol. 145] call "ejes" in Spanish, are part of the machine; these machines that were sold were sold complete with the power table, shaft and spool holders; as to what was the price complete, including all of those items, I am going to give you that approximately because I haven't got the exact amount they bought for, because we destroy every two years the records; the selling price at that time was around $2,100; the price for each head was $51.25 plus two percent; the price including the power table and all the other parts of the machine, was around $84 each installed.

We have to figure the price of the machine head, then the power table; machine head, $51.25; the power table, per space, $19.50 plus two per cent; spool holder, $1.20 plus two per cent, and the ball bearing hanger, $4.75 each, plus two percent; for a bench of 26 machines we have twenty-seven hangers; more or less one and a fraction for each machine; I figured the 26 machines complete at $2,100, and then I divided that by 26; it was not $2,100 flat, because I included there about thirty or forty dollars for installation charges; the price of the Singer 96-10 was $51.25; that is the machine head alone; the price of the 95-10 was $46.25 plus two percent; the complete machine would be more or less $84 less $5, about $79; Mr. Brown, in quoting we have to figure on the setting up charges; we charge for the labor; the 96-10 is eighty dollars and a few cents more or less for the entire machine; the machine

we are now talking about, the 95-10 would be about $5 less; the 96-10 installed is $84; and the 95-10 set up is $5 less; the 95-12 is $63.75 plus two per cent; there is a 96-03 machine.

The price of the 96-03 machine in March 1932, was $48.75 plus two percent; these prices that I have given are prices as of 1928 and 1929; our prices were not increased until this year; 1927, 1928 and 1929 and up to 1934, the price is the same; as to the 95-12 I gave you the price of the head only; in my line we sell individual stands and tables; we sell the head only and we sell the machine complete with the power tables and the spool carriers and some special types sometimes to perform special work; we sell power tables by sections, sections of two spaces; if the customer buys less than three sections it is one price; if he buys more than three sections it is another price; so I [fol. 146] cannot give you the exact figures; so the best thing to do is to take the 26 machines and group them and make a complete estimate for the 26, and then divide that by 26 and you get an approximate price for each machine; we sell a group of machines with all their attachments cheaper than we sell a single machine; according to my figures the price of these 26 Singer 96-10 machines in 1928, which we sold to Dolcey & Company, was $2,034.08; that is complete; but I added to that more or less about forty or sixty dollars for incidentals, for local freight, and setting up charges and so forth.

The Singer Company never sells second-hand machines; we never buy second-hand machines or sell second-hand machines; the price of the 96-03 is $48.75 plus two percent; these prices do not include the motor; the motors are sold separately; we sell the type 112 W 115 type of machine, with two needles; the 112 W 115 machine head only we sell for $161.25 with two percent; I am quoting the head only; there is something about that machine; that machine is without any special fitting; that is a double needle machine, a felling machine, for felling; there is a different kind of attachment that goes with the machine for different work; I don't know how it was equipped, because it was not bought from us; the machine without attachment is sold for $161.25 plus two percent; machine 81-5 sells for $161.25 plus two percent; 22 W 100 "doble costura" is an

obsolete machine; I think he bought that second-hand; I have no record of that machine.

Whenever we cancel a machine we are informed by our factory and we record it in here; my record shows that the Singer manufactured that machine up to 1925; since then I don't think it has been manufactured; we have different kinds of machines; for instance, we have the 22 W 102, in place of that machine; you can use that; that is similar to the 22 W 100, and we also have the 22 W 110; they sold at $101.25 plus two percent in 1932; the Singer make and sell a machine called the 68-7 for sewing buttons; the price of that machine new in March 1932 was $201.25, plus two percent; we sell a machine No. 51-10; in March 1932 No. 51-10 sold for $51.25 for the head, plus two percent; sometimes we sold the motors that go with these machines; we did not sell General Electric motor 2 H. P.; that is a Gen-
[fol. 147] eral Electric motor; if the power table was sold separately the price was $19.50 per space; the spool carrier, separately, was $1.20 each.

The transmissions were part of the power table; those could be sold separately as replacement; the shafts were sold separately as replacement; they came as part of the power table; they all go into that price of $19.50; that price of $19.50 includes shaft, transmission, belting, pulleys, wood-work and iron-work; it does not include the spool carrier; that is $1.20; low price machines such as the 95-10, 96-10 and the 44, are not equipped with spool carrier; we sold that separately, but a special machine such as the 68-7 and so forth, the spool carried is included in the price of the machine; there is always a depreciation for each machine; we have no fixed rate for depreciation; I haven't had any experience in depreciation; as regards the proper depreciation on machines of this character annually, there are too many things to take into consideration; I mean in regard to care of the machine and how it is operated and so forth; it is pretty hard to say.

A machine that is carefully operated and well taken care of to avoid breakage or overstrain should deteriorate less than one that is not well taken care of; the market price of second-hand machines of this character depends upon the condition of the market; in February and March 1932 there were quite a bunch of second-hand machines avail-

able in the market; there was no scarcity of second-hand machines in 1932; according to my observation, I heard of a few sales made ranging between forty and sixty percent of the original price, I mean of the price new; with reference to this type of machine, I mean the 96-10 and 95-10, that is a very simple machine and we figure that the machine is good for twenty years; the special machines are different; they are complicated machines, and have more moving parts to wear out; that is good for about ten years; that life of the machine assumes that the machine is well taken care of, and that proper replacements are made.

But always a machine after two or three years of use uses up many parts, and the owner has to replace some part every month; as the machine gets older the more frequent the replacements are; as to whether the life and [fol. 148] usefulness of a machine of the kind that we sell depend somewhat upon the experience of the operator and the care with which it is handled, and whether needed repairs are promptly made, that is something too; the operator deteriorates the machine too much sometimes; when I say twenty years is the average life of the machine, I mean to say if it is kept in repair during that time; I don't mean that it doesn't need repairs, it has to be repaired.

[Answering questions propounded by Mr. Travieso, the witness testified:]

The sale of machines to Dolcey & Company was made in the year 1928; I have the exact month and the exact day too, January 28, 1928; those machines, at the time of the fire in March 1932, were just a little over four years old; the life of one of those machines is twenty years; twenty years of good service, satisfactory service, if the machine is properly taken care of and repaired; any one of those machines, by replacement of worn out bearings, ball bearings and parts that wear out, you can make it render efficient service for twenty years; we sold to Mr. Rivera Soler repair parts since 1927, since he started a factory, up to the present time; those repair parts, spare parts, that we sold to Rivera Soler & Company were for the purpose of keeping those machines up to date and in good condition; the work was done under the supervision of our office; I am not able to state what was the condition of those machines in the month of March 1932 because I

did not pay any visit that year to Mr. Rivera Soler's factory; I did not make any inspection.

As far as I can tell from my records, my last inspection there was August 26, 1931; the fire was in the following March, 1932; at that time, on my last inspection on August 26, 1931, the factory was in good shape and good running condition; I inspected twenty-five 96-10s; two 96-03s; five 91-01s; forty 95-10s; six 95-12s; six 44-8s; two 71-30s; one 114-6; one 24-13; all those were sewing machines and were manufactured by the Singer Sewing Machine Company; they were all in good running condition; the total number of machines was 88; sewing machines; I did not inspect the sewing machines one by one; I only stick to sewing machines; that is my specialty and my line; I examined [fol. 149] those machines the last time at Pumarada Street, around Park Street.

[Answering further questions propounded by Mr. Gonzalez, the witness testified:]

I did not examine those machines very thoroughly; I used to go to the factory, walk around the benches, take a look at the machines and see if they were working; that is my regular inspection; Rivera Soler had only in his plant twenty-five 96-10s, and twenty-four 95-10s, two 95-12s and one 24-13 bought from us; that was new equipment bought from the Singer Sewing Machine Company; the 95-10 machines were bought in 1927, and the 96-10s in 1928; the other machines I don't know when he purchased them.

[Answering further questions propounded by Mr. Travieso, the witness testified:]

If there are two machines, one brand new and one that has been in operation three or four years, but which has been kept in good running condition, if the old machine is properly adjusted and new parts and so forth, they give the same service; the only thing is that the appearance of the machine is changed, that's all; the new, fresh one looks better than the other, but the efficiency is the same; it is O. K.

[Answering further questions by Mr. Gonzalez, the witness testified:]

As to whether those two machines to which Mr. Travieso refers are worth the same amount of money, that depends

upon the person that is going to buy them; but for the person using them, they have the same value; as to whether the market price would be the same for the old machine as for the new one, if they are to be sold, it depends upon the market and who needs the machines, because I have noticed that people have bought machines, old machines, at ridiculous prices, paying too high for them, and in other cases new machines were sold for ridiculously low prices; if I were buying the two machines, the new one and the old one, I would not pay the same price; this morning I testified that the market price of a second-hand machine is about forty to sixty percent of the value of the new machine.

[fol. 150] EMILIA RIVERA, a witness called on behalf of the defendant, answering questions propounded by Mr. Gonzalez, testified as follows:

My name is Emilia Rivera; I reside at San Miguel No. 25, San Juan; I am a seamstress; I did work for J. Rivera Soler & Company, Inc.; I worked in the shop at Sagrado Corazon Street, and also in the shop on Pumarada Street; I don't know anything about what happened to that shop on Pumarada Street; I worked one week in that shop and afterwards I worked at my home; I know there was a fire that destroyed that shop on Pumarada Street; I worked there only a week before the fire; after that, when I left the factory, I went to my house and worked on work for the same factory; I took work from the shop that I did at my home; I used to go to the shop and get it and take it home; I took children's pants; Antonia Coll, the lady in charge of the place, gave it to me; on the day of the fire I still had work in my home from there; I had eight dozen of children's pants; after the fire I delivered them to Mr. Rivera Soler at Stop 24, at the new office; I don't know how many people went to get work there or how much work they got to take home with them; many people got work when I went to get work there.

[Answering questions propounded by Mr. Travieso, the witness testified:]

The last time that I went to the factory to get work was one week before the fire; I did not go to the factory at all

for a whole week before the fire; I am positive that the amount of work that I had in my possession was about eight dozen; it was eight dozen; I got those children's pants that I was making from the factory of Rivera Soler, I don't know whose they were; I worked in the shop only one week and then I took work home.

[Answering questions propounded by Mr. Gonzalez, the witness testified:]

I worked in the Sagrado Corazon Street shop for one year, and after he moved to the establishment in Pumarada Street I worked there one week and then after that I took my work home; I discontinued working in the factory because I lived here in San Juan and it cost me too much to go out to Santurce every day to work in the factory; it [fol. 151] was machine work that I did at home; it was my own machine.

[Answering questions by Mr. Travieso, the witness testified:]

I took the work home because I was unable to continue working at the factory.

Ceferina Gonzalez, a witness called on behalf of the defendant, answering questions by Mr. Gonzalez, testified:

My name is Ceferina Gonzalez; I reside at Cantagallo Street, Santurce; I am a seamstress; I worked for the corporation J. Rivera Soler & Company, Inc. for four years, in the Martin Pena shop at first and later in the shop at Stop 42; the street in Martin Pena where that shop was located was Sagrado Corazon Street, at Stop 27; I worked in the Pumarada Street shop until the date of the fire; I worked there until the Saturday prior to the fire; the fire was at night; I worked there until mid day Saturday; I worked on children's pants and blouses and underwear, on a machine, upstairs; I don't remember how many machines or how many benches there were in that shop; I never counted them, but there must have been seventy-two or seventy-six machines; there were two big benches and one small one; on that Saturday before the fire I was working in underwear, ordinary underwear; I was using just ordinary broadcloth, ten cents a yard stuff or two yards for a

quarter; inexpensive material; that material is used for underwear and it is used also to make pillow cases.

That Saturday morning there were working on those machines sixteen or twenty women, more or less; there were very few because there was very little work and each one, upon terminating what she had in front of her, if she didn't have any more furnished her, would go home; there was very little material to work with that morning, there was no work started; everything had been finished when we got through; besides the women working on the machines, there were other employees; for instance, those working on embroidery; I could not say how many women there were working downstairs; I was not thinking of anything else but to get through with my work; I paid attention to nothing else; they gave work to be done outside of that factory; I took some of that work home too; on the date of the fire I had some work at home, but I had re-[fol. 152] turned it to the factory the week before; on the date of the fire I had work that I had taken to my home from the shop; eight and a half dozen; I delivered those eight and a half dozen later at the new office at Stop 24; after the fire; I know that I had taken the work out a week before the fire and afterwards I returned it again; I don't know how long after, but about one week or two weeks after the fire; I turned that work back to Antonia Coll; Antonia Coll worked in the shop of J. Rivera Soler & Company, Inc., as receiving clerk in the counter; when I delivered that work to Antonia Coll she was working in the office that Don Pepe had established at Stop 24.

[Answering questions by Mr. Travieso, the witness testified:]

Since I began to work in that factory I had been taking work to be done at home; I worked in the Pumarada Street factory for eight to ten months; I worked inside the factory and besides that I took work to be done at home; they would always hand us out a certain amount to be done at home, in addition to work at the factory; there were many others, besides myself, who did the same thing, who took work home; they took it home and then they brought it back to the factory when it was finished; I understood that those goods that I was working on were goods belonging to some house in the North; I worked as though the work were be-

ing done for Don Pepe, but I saw the work coming from the North and being shipped to the North; I couldn't say if it belonged to anyone in the North or not; I knew nothing about that; I had never spoken about that with the principal of the shop; on the Saturday previous to the fire there were some embroiderers there besides the seamstresses; I couldn't say how many embroiderers were working there that morning, because I was paying attention exclusively to my work; I can not state the exact or approximate number of people working there that Saturday morning because I was attending to my own work; I was busy on my machine making my living by sewing; I paid no attention to anything except my work; I am sure that on the machines there were only fifteen or sixteen women working, very few.

[fol. 153] PROVIDENCIA GONZALEZ, a witness called on behalf of the defendant, answering questions propounded by Mr. Gonzalez, testified:

My name is Providencia Gonzalez; I reside at Santurce, Cantagallo Street, in front of Stop 50; I sew and do domestic work; I did work for the corporation J. Rivera Soler & Company; I worked for them when they had the shop in Martin Pena, and also when they were at Stop 42; I worked for them for quite some time, around four years; the shop in Martin Pena was close to the guagua station; I don't remember the name of the street; that is on a side street leading to Ponce de Leon Avenue; it was a street that came down from Martin Pena, but I don't remember the name of it; the name of the street at Stop 42 where the shop was is Pumarada Street; all I know about what happened to that shop is that I understood it had been burned up; I worked in that shop the day before the fire; it was on a Saturday; that day I worked until noon, upstairs, sewing blouses and petticoats and such things; those petticoats were made of common broadcloth; I worked on a machine and also by hand.

That particular Saturday morning I was sewing on buttons, until midday; I sew those buttons on by hand; I can't say the exact number of women that were working on those machines Saturday morning, but I would say about nineteen or twenty; some of the women took work to their homes; I

had had four dozens at home and I had returned two dozen and still had two dozen; on the day of the fire I had two dozen at home; after the fire I finished the work and delivered it at the office that they had opened at Stop 24; Don Pepe Rivera Soler ordered me to deliver it at Stop 24; I can not say how much work there was to be done that Saturday morning in that shop where I was working.

[Answering questions propounded by Mr. Travieso, the witness testified:]

My name is Providencia Gonzalez; I worked for Rivera Soler & Company at Martin Pena. Antonia Coll employed me to work there; I know her very well; she was the one who gave out work to be taken home, and she was the overseer there; when I returned the work I delivered it to her; I know Dona Ana, the wife of Mr. Rivera Soler; she employed me to work in the factory; as to how it is that I remember that the [fol. 154] last day that I worked there before the fire was a Saturday, one must know the days that one lives; on Saturday, for instance, we only work half a day; that morning there were only about nineteen or twenty seamstresses working, something like that; I would not be able to state positively whether there were more than twenty; I did not count them, I didn't have time for that; I had my work to do; the number of women employed there on Saturdays was usually less than on other days; for some days prior to this there had been but little work on hand, and as a consequence there were few employees working.

On the morning of the Saturday before the fire there were some embroiderers there; I could not state how many embroiderers there were because they were behind us working in a back part of the shop; there were several of them working that Saturday; it might be that besides these people that I have mentioned there were people downstairs working, but I didn't see them; I was upstairs working all morning; I could not give a description of this factory of Rivera Soler & Company that was destroyed by fire; all I can say is that there was but little work; that's all that I came here to say, that there was little work; I don't know anything else except that there was little work and that there were only nineteen or twenty women working there; outside of that I don't know anything else.

Q. 1. And you are not supposed to say anything else except that?

Mr. Gonzalez: I object to that, your Honor.

Mr. Travieso: That's the way she is answering my questions, your Honor, and I am cross-examining.

Mr. Gonzalez: But you ought not to ask that question.

The Court: It has a tendency to show what the witness' attitude is.

Mr. Brown: Exception.

The Witness: All I can say is that there was but little work, and that there were four motors, three motors; two large ones and one small one; I remember that there were three motors, two large ones and one small one, and I saw two other machines and one button-hole machine, and a button machine; those machines were not used.

[fol. 155] ANTONIO GONZALEZ, a witness called on behalf of the defendant, answering questions propounded by Mr. Gonzalez, testified as follows:

My name is Antonio Gonzalez; right now I live in Santurce, my home is in Patillas; I am a perforator, when I have work; where I worked was in the shop of Rivera Soler & Company; I can not state exactly how long I worked for that company, but I worked there for about six years more or less; I worked at Sagrado Corazon Street No. 5, at first, then at Pumarada Street No. 3 or No. 4, I don't remember the exact number; that factory in Pumarada Street was burned; I worked in the downstairs part, especially, but I worked all over the factory; downstairs I worked as a perforator, and I also worked in the stamping department, and I worked also in checking the work that came in; in all that kind of work, the perforators make a drawing which is placed on top of the cloth to make the design for the cutting; I would make the design; you use a little machine to perforate which has a small needle, and you put the plan on the cloth and perforate the cloth around the pattern; you tack a dozen in place and the girls come along and cut it; all the work of that shop would have more or less embroidery work on it, and what I drew was the design or stencil for the embroidery work.

I did work in the shop of Rivera Soler & Company in Pumarada Street throughout the month of February, 1932; I was always there; I worked there the whole month of January 1932; I was working there during the days of March

1932 when the factory was running; during that time I slept down in the basement of the factory; I did not miss any day's work during that time, I was there constantly; I worked from eight to twelve and from one o'clock on, up to five or five-thirty or six o'clock; I had no particular hour to knock off; I worked on the lower floor; usually I had to see the merchandise that came into the establishment, because I was the one who generally received it; when the merchandise arrived there I would certify to it on the tables; on the cutting tables; after I checked that merchandise I put it under the cutting tables, on a shelf; if there was too much we would put some on the shelves.

On the morning of the day before the fire I was working [fol. 156] in that shop as usual; I did not receive any merchandise that morning; nearly every day there they would send out work on the island or out to private houses; up to midday on that Saturday before the fire packages were being made up and sent out; that day I was finishing stamping a dozen table cloths, and some miscellaneous articles like creepers and so on; Mr. Rivera Soler, since the morning of that same day, seemed to be in a hurry to get these articles stamped and ready; I don't know what happened to those articles; I stamped them and they were taken off to another table and I don't know what happened; I could not state with certainty how many people were working in that shop that Saturday morning, because I didn't count them, but there were more or less thirty women there; counting all the people in that place, there were about thirty-six or something like that.

That Saturday morning they were working upstairs on the machines, but not all the machines were in use; they were making petticoats with a heavy cloth; it looked like broadcloth, but it was not broadcloth; I know that because I know what broadcloth is, and that material consisted of remnants from the cloth from which pillow cases had been made up; I attended to the stamping of that material; I was the one who had to do with the stamping; that Saturday morning there was no material uncut on the cutting tables or on the shelves downstairs; there was some material cut, but very little; this material was underneath the cutting tables; the material was just placed on the shelf under the cutting table; you could easily see it from outside; it was just placed there in little piles, in small quantities; that material covered very little of that shelf because the tables

are quite long and wide, and it was almost empty of material; I always went upstairs where the machines worked because if one of the machines got a belt off, I would have to go up there and fix it; I did go upstairs that Saturday morning; there was no merchandise upstairs at all, except what was being worked on by the women at the machines.

The last week before the fire there was little work in that factory, but there was an amount of activity in the shop; the thread that they used for the machines and the embroidery was stored upstairs, where they used to have an office; they kept the thread and materials there; I did go [fol. 157] into that room; during the months of February and March 1932 I visited that room every little while; I had to go in there to get the thread and to put away a model of clothing or a sample would be kept there and they would send me up there after it; I could not say exactly the amount of thread in that place in the month of March or February 1932 because I never counted it, but I know there was very little thread because I was able to see that; the thread is brought in and put in this place; anybody could receive it; I cannot say that I was there for the purpose of receiving thread, but since I was there anything like that would come in anybody would take it and put it away.

I do not remember of any delivery to the factory of any big shipment of thread worth thousands of dollars; there never arrived any considerable lot of silk in that factory without being already cut up; it came already cut up; formerly, they worked in silk suits but the material came already cut up; I never saw bolts of silk delivered to the factory, it never arrived there; if it did it was kept in some other place where I could not get at it; Teodoro Rodriguez and I worked in the same department, more or less together; from the place that I worked I could see where Teodoro Rodriguez worked; I was here and he over there in the same room; on Friday or Saturday before the fire I saw Rodriguez cutting those petticoats that I referred to, from cloth that he had as overages; that cloth was used to make pillow cases and pillows, but they had this overage and during that week he ordered that it be cut up for the machines to make petticoats.

I did see the building of a room or a little house inside the factory on the floor where I was working; I cannot state the exact date when they finished building that small house, but it was two or three weeks before the fire; that small

room was built up in the middle of the room where I worked, and it was enclosed by pitch pine boards, but the walls did not come down to the floor; they reached to about six inches above the floor; that room used the same floor as the building; it had one door; Mr. Rivera Soler had the key to that door; the walls of the small room built inside the building where I worked did not reach the floor; they did not go clear up to the ceiling; that room had only one door; this is the place where I was working; the door of that room [fol. 158] was on the left-hand side from where I was working; the place where I worked was not in front of that door; it was on the left-hand side of place where I was working.

Here is the room, and here is where I am working, and it was on the left-hand side like that door over there, for instance; the door to the room was on my left from where I was working; they had a padlock on that door; I didn't have a key to that padlock; when I was ordered to store things in there I would help Mr. Rivera Soler to put things in there; ever since it was built orders were given me to store things in there; what was put in there were some remnants of merchandise which were left over and some card board boxes which contained articles that were not needed, like bias tape; these materials were put on some shelves that were built in that room; I never put any silk inside of that room; I never saw any silks being taken into that room; I never saw any bolts of broadcloth being taken into that room; as I said before, I saw pieces, remnants, being taken in there; I do remember when Pumerada and Escudero and Valloveras were connected with this business, I worked with them; when those three gentlemen were connected with the company, I had the keys to that establishment, and also Teodoro Rodriguez, another employee.

I remember when Mr. Berrios Berdecia and Mr. Simon Rojas came into the business; when they came into the business, I had my key for a week or some days, and after that they took the keys away from Teodoro and myself; Mr. Rivera Soler and Mr. Jose Berrios took away the keys; that man Simon Rojas, I only saw him there a couple of times; I don't know the name of the material to paint glass to permit the light to enter, but at the same time make the glass opaque; after Mr. Berrios and Simon Rojas came into the business they ordered the glass painted a dark blue; the day before the fire I worked as usual; as to what I did after I finished work, Mr. Rivera Soler had asked me

since the morning of that day to go with him to his house out near Guaynabo, alongside of the road; he told me before we left in the morning to go out to his house to line a box for a rifle that a friend of his had given him; I went out to Guaynabo with him, together with him and Mrs. Soler.

We carried some packages with us; paper packages; [fol. 159] there was one good size package, and two other smaller ones; there was one package about this high [witness indicates about two feet]; the others were of different sizes, small packages; instead of going to his house we went to the house of Juan Villeta and there we left the larger package; the other packages we took to his house; I don't remember whether those packages were outside or inside the car; when we got to Guaynabo we took out the packages and other little things, and we went inside, into the house, and we started in to line the box that I have already told you about; I know we arrived at Guaynabo a little late; he had offered to take me back to San Juan again in his car, but after we were out there at his home he told me that he didn't feel very well, and that he would give me money with which to come back to San Juan, instead of bringing me back himself in his car; I cannot state exactly what time that was because I didn't have a watch, but it was around five o'clock or ten minutes after five when I left there; I came back to San Juan in a vehicle, in a bus.

When I went to Guaynabo with Mr. Rivera Soler, Mr. Jose Berrios and the bookkeeper who was there stayed in the factory; the surname of the bookkeeper is Wolf, I don't remember his first name; before that I had been taken out a few times to Mr. Rivera Soler's house in Guaynabo; it seems to me that about a week before that I was out to his place; before that day I had been out there once only; I was invited to go out to his house on one other occasion only; besides that occasion about a week before the fire I had gone out to his house, but a long time before that; during the week prior to the fire I saw many empty boxes in the factory; they were the large boxes that come with the merchandise; they were of various sizes; some of them were four or five feet high, and others were of different sizes; those boxes were made of wood; I saw them bring those boxes into the factory during the week prior to the fire; they were piled up around the little room in the middle of the building.

I know those boxes were empty because I assisted in receiving them and placing them where they were; before the fire those were the last boxes that came in to the place; they were there on Saturday, the day before the fire; I cannot state whether anything was placed inside of those boxes before the fire because I didn't see anything put in [fol. 160] them; I had occasion to see the machines that were upstairs in the factory; I remember some machines that were purchased by a company named Dolcey & Company for Mr. Rivera Soler, I was working there when those machines were received; I know that they had purchased ten machines here on the island, and especially there was a bank of 26 machines there, and two banks more of ten machines each; that was the old shop in Sagrado Corazon Street; I remember that he had ten machines besides the ones that he purchased from Dolcey; I remember them because I was always seeing them there; those ten machines were in very bad condition; they were purchased second hand; I am referring to the ten machines that he had out at Sagrado Corazon Street, that he had purchased from Vicente Tellado.

I worked on the machine for perforating; there was only one of those machines; I am sure because I am the one who worked on that machine; I remember seeing a machine for pleating which was never used during the time I was there; that machine was not complete because when we were at Sagrado Corazon there was a large copper tank or drum which he had sold, and the balance of the machine was there but it was unserviceable; I remember a machine that he had to cover buttons; that was a machine to cover buttons, which are of tin, with cloth, by the operation of the machine; I don't know in what condition was this machine; during all the time I was there it was not used; I don't know if it was serviceable or not; when I arrived from Guaynabo that Saturday before the fire it was late; I went into the basement where I was in the habit of sleeping, and from there I went out and went to get something to eat.

When I came back from Guaynabo I saw the building the same as usual, and I went in to my sleeping quarters; I didn't notice anything particularly; when I went in I changed my clothes and then went out to get something to eat; I went out for a walk around the city and I came back at around twelve o'clock at night; when I got there again

late in the night, as usual I went into my room, but as my companion Teodoro Rodriguez had not arrived, I waited for him as usual so as not to have to get up out of bed to let him in when he arrived. I started to read a while, and then I got tired of reading, and as it was warm in there I [fol. 161] thought of the idea of taking a bath while waiting for my friend, and did so; I took my bath and when I got through and had grabbed a towel to dry myself, the light went out and I was left in the dark; when I saw that I thought the lights must have gone out in the streets and everywhere, and I went to the door that leads out into the alley through which I come to reach my quarters, and when I looked out through the door I saw the light up above and I saw flames and much light.

I was almost altogether undressed at that moment, and as best I could I went back into my room and got hold of my clothing and I dressed hurriedly and got out and ran to advise the people in front to get them to call the firemen by telephone, in the house of Don Manuel Pumarada; he got up immediately and called the firemen in a moment and in a few minutes they arrived there; inasmuch as the upper part of this building was all of wood, and even the columns supporting it were of wood, it went up quickly, and the firemen were hardly able to put out the fire at all; that's all there was to it, as far as I was concerned; I was so frightened I couldn't say how long a time elapsed between the time that I went out of my room and the time the roof all came down as a result of the fire; I had to run out into the street almost undressed; I didn't see Mr. Rivera Soler there that night; after that I saw him for the first time the next day at the police station; I did not see Mr. Berrios there that night; I arrived there about midnight; I didn't stay there because Teodoro Rodriguez and I were placed under arrest and taken to the police station.

[Answering questions propounded by Mr. Travieso, the witness testified:]

Handling the perforation machine was not all that I did in the factory; of course, you will understand that that is a job that only requires a short time, and I had lots of time to do other things; I looked after the stamping operations; I looked after the merchandise arriving there and checked it up; when I wasn't doing this work with the perforating machine I was busy with any other work that had to be

done; I did not have to work upstairs constantly, but if a belt came off a machine upstairs I had to go up and fix it; I went up and fixed it and then left; I was a general utility [fol. 162] man around there; on the Saturday previous to the fire Mr. Rivera took me to Guaynabo; I went to Guaynabo around that time only on one other occasion, but a long time back I was there once before.

I used to live on Mr. Rivera Soler's farm, that was when I first became employed with him; I worked there as gardener and doing different things; they had a peon for the service of the house; since the fire I have not worked for Rivera Soler; I did not care to work any longer for him; I wasn't altogether in agreement with him and I left the job. We had words upon one occasion and we were not in agreement with what I wanted nor I with him, so I left the job; I lost some property in that fire; it is true that I tried to collect an amount of money from Mr. Rivera Soler and that he refused to pay it to me, and that was the disagreement that I had with him; I asked him to pay me something for the loss that I had sustained; I lost everything in my room, including my clothing and all that was in my room; I cannot remember at this moment what I lost; I didn't ask him for any specified amount but he didn't pay me; I told him I would like to have him give me enough to buy a suit of clothes at least, because I had no clothes, and he told me that when he was able to collect he would give me something; that was the cause of my breaking away from him and leaving his employ.

When the lights went out while I was taking a bath before going to bed, I went out of the building and saw the lights, the flames caused by the fire; I saw flames coming out from upstairs, but in the excitement of the moment I did not notice exactly where they were coming from, whether from the first or second floor; before the lights went out I had no indication that there was a fire, no smoke or any smell of fire; I had no idea of the time; I had my conscience clear at the time; this light that I noticed that went out was the electric light in my sleeping quarters; I had a light on in my room and that went out, and I know nothing further; I cannot say that the building had only one light burning; there might have been other lights in the building; that is the light that went out, and that made be go out and then it was that I discovered the fire.

[Answering questions propounded by members of the jury, the witness testified:]

[fol. 163] While I was working with Rivera Soler I received a regular weekly wage of $8; I have a family to support and I sent them as much as I could after covering my expenses here; my family lives in Patillas; I ate at Duprey Street No. 54; I paid $3 weekly for my meals; on the Saturday before the fire there was less merchandise than that usually carried; there was quite a bit less than usual; the merchandise on hand the day before the fire, as compared with the merchandise on hand the week before, was about the same as the week before; there wasn't even a third of the merchandise on hand the Saturday before the fire as there was on the first of February; all the merchandise was in one big room, and from the volume of merchandise one could easily determine how much was on hand; on the Thursday before the fire there was a shipment made; that was quite a lot of merchandise; a considerable amount was shipped to the United States that had been manufactured in the factory the week previous to that Thursday, but inasmuch as there was a lot of work out in the island that the people brought in, finished work, that also was added to the amount shipped; that was also shipped together with what was manufactured in the premises.

The work that is done in the factory and the work that is done outside is all the same and every Thursday they made a shipment to the States; sometimes they sent more, other times less; every Thursday, whatever was on hand would be shipped; the completed merchandise would be shipped; at present I am working with Mr. Fine; I don't work steadily, full time; he sends for me when he requires my services; Mr. Fine works with the wife of Don Adolfo Lopez; I don't know if they are partners in the business or not; I believe Adolfo Lopez had been a partner of Mr. Rivera Soler; I don't remember exactly how many designs I perforated during the week prior to the fire, but I do remember I made two or three dozens for the petticoats that we were making at that time; the dozens of stuff stamped out of each design depends upon the carefulness of the stamper; that is easily spoiled; it depends upon what they tell me to do; they made very few designs that week; I made three; I didn't do the stamping; I made the designs

and I directed the work of the stampers who did the stamping; with the design that I made there might be stamped [fol. 164] 300 dozens; you can make up five or six copies of that and each copy would serve to make up a hundred dozen.

I cannot remember how many designs I perforated the week before the fire; if a design is spoiled and I have to make up a new one, I make it; I could not state how much it usually takes to terminate a garment completely from the time it is stamped until it is finished because after a suit is ready it is parcelled out; of one article one or two dozen are delivered to one worker and some to others; there we didn't make gentlemen's suits, but children's suits; one worker, for example, will put on the collar and it goes from there to another who puts on the sleeve, and another will do the embroidery, and another put on the buttons, and then it goes to the hand worker, if there is any hand work to be done on it; so you rarely see a suit in a finished condition for some time; I never drink liquors to excess, and I can say that I don't use liquor; no one who knows me can say that they ever saw me drunk on the street; that night before the fire I did not have any alcoholic beverage.

AUGUSTO NAZARIO, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown, testified as follows:

My name is Augusto Nazario; I reside in San Juan; I am general liquidator of Internal Revenue, Treasury Department; the assistant chief of the department is Mr. Sanchez Morales; my position is that of liquidator of internal revenue taxes; since the sales tax law was enacted in 1925 my department carries records of all importations of articles subject to tax under that law that are brought into Puerto Rico from outside; at present there are two employees who go every day to the steamship agencies, to the express office, the post office and the custom house, and who take note of all merchandise introduced in Puerto Rico; the steamship companies as well as the express companies have to show us their bills of lading covering the merchandise received, and from that is taken the data as to the articles that are taxable; that information is preserved in my department; not all, but from 1930 up to date we have

preserved all the data; we also have in this department a complete record of all excise or internal revenue taxes paid on articles the sale, use or consumption of which is taxed under that law.

[fol. 165] Mr. Brown: Now, your Honor please, in view of your Honor's ruling yesterday, I don't want to ask a question which would be contrary to that ruling, but I do want to make an offer of evidence so as to save the question; I want to offer the testimony of this witness, who is in charge of the records of this department, the internal revenue bureau of the finance department of Puerto Rico.

The Court: Has he brought in his records?

Mr. Brown: I have not completed my offer yet, if your Honor will permit me. To show that there is no record of importations of sewing machines or like machinery by Jose Rivera Soler, who is president of this plaintiff corporation, or of the payment of any tax on such machinery brought in by Jose Rivera Soler or by his company. Now I understand your Honor's ruling is that the evidence is not admissible unless the records are produced?

The Court: Where a record is kept of transactions in a public office, as I understand the rule it is that the record is the best evidence as to what it contains, and where certain transactions under the law may be a matter of record, or under the law a record is offered, the particular transaction does not appear, that is evidence at least that it did not occur. I may be wrong.

Mr. Brown: But your Honor holds that the record must be brought?

The Court: It should be produced, or if it cannot be produced a certificate from the office, where that is permitted under the statute, and in many cases it is a certificate giving the history of the transaction and that a search shows no record.

Mr. Brown: His testimony is equivalent to a certificate.

The Court: If you can show me the authority—I have looked it up since my ruling necessarily very little but as I interpret Wigmore that is the rule, although in a good many cases there is a conflict of authority. It seems to me that the rule is sustained by reason where you offer to show a certain transaction under the law must be made a matter of record, is the best evidence that it did not, is the fact

that the record in which those transactions are recorded does not show.

Mr. Brown: But your Honor holds that the records must be produced?

[fol. 166] The Court: Or if he can show that the records cannot be produced.

Mr. Brown: Well, in this case we do not claim they cannot be produced. We claim that this department keeps a record obtained from the steamship companies and express companies, the post office and the custom house, as to receipts of merchandise, taken from bills of lading and similar documents of every importation into Puerto Rico. By importation I mean from the United States as well as from foreign countries, of articles subject to tax; and that they also carry a record of all tax payments on articles subject to excise, and this witness made an investigation of these documents and records and has found no such entries by Rivera Soler. Now I understand your Honor holds the records must be produced, and your Honor will allow me an exception?

The Court: Yes.

Mr. Brown: That's all.

[Answering question propounded by Mr. Travieso, the witness testified:]

These records that I refer to are kept in the office of internal revenue; those records cover importations through all the ports of entry in the island and they are all in San Juan, available for all the island; those records are under my personal charge.

Jose Manual Canals, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown testified:

My name is Jose Manuel Canals; I am a civil engineer; I am connected with Mr. F. A. C. Hastrup since about seven or eight years ago; I was charged by Mr. Hastrup with certain work and investigation in connection with the fire that occurred in the factory of Jose Rivera Soler & Company in Santurce on the 13th of March 1932, which was a Sunday; this fire occurred in the early morning hours of that Sunday morning, the 13th of March 1932; on Sunday

morning I went there; on Sunday morning I was called up by the agent of the company telling me that a fire had occurred at Pumarada Street and that they wanted us to take charge of that. At about ten o'clock in the morning I went to the premises and when I got there I saw the building was a two story concrete building with a basement at [fol. 167] the rear, and in there I found some remains of machinery and shafts and pieces of cloth and paper and other things which I cannot remember now; that morning I did not make an inventory.

That morning I found two men there who were watching the premises; one was placed there by Mr. Simonpietri, who had the building insured, and the other told me that he was placed there by Mr. Rivera Soler, or some other member of the firm. They said they were in charge of the premises so I went home; in the afternoon I found them there still; Monday morning I went to the premises again and found them still there, so in the afternoon I went with a notary public and took an inventory of whatever was identifiable; everything that could be identified was inventoried; I subsequently preserved that inventory in a notarial act; this that you are showing me is the acta and this is the inventory; it is signed by me; here is the inventory of all the machinery; that is what comes in the first place; we took the number of the machine and the letters and the style; we found a sewing machine No. 95-10, No. AB-911285; another Singer No. 95-10, No. E. G. 8,261,404; another one No. 96-10, No. AB-660,297; another 96-10, No. AB-661,176. The inventory attached to the notarial instrument that I have shown contains a complete list of all of the articles that I found at this place after the fire and that I inventoried; I am quite sure it is correct, I made it myself.

[The inventory is then offered in evidence and admitted and marked "Exhibit No. 2 for Defendant".]

The motors that I found there after the fire, that appear at the foot of the list, were motors of the type and characteristics that I have detailed in the inventory; the numbers were taken from the brass plates attached to the motors themselves.

LUDWIG L. LINDSTROM, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown, testified as follows:

My name is Ludwig L. Lindstrom; my residence is at No. 6 Washington Avenue, Santurce; my business is the sale of electrical equipment; I sell electric motors; I represent the General Electric Company; that description of the motors appearing in Exhibit 16 for Plaintiff contains noth- [fol. 168] ing as to their characteristics, except the horsepower; there is no speed and no voltage shown; without knowing that I could not tell the value positively, but we can assume the speed; in order to tell I would require the voltage and the speed; I cannot give you an accurate price on a General Electric motor, 3 H. P., 60 cycles, continuous, 14.5 amperes, one phase, 110-220 volts, as of March 1932, because there have been several price changes since then; I can give you the present day price, or the price a year ago, an accurate price for the motor a year ago; the prices are higher today than they were a year ago; the prices on our motors today are 21 percent higher than they were a year ago today, and two years ago today they were approximately the same.

There was very little change in price between two years ago and a year ago, very little change; there was some small change, probably five percent, I would say; the present day price of these motors is exactly 21 percent higher than a year ago, and approximately that much higher than two years ago; between 1932 and 1933 there was a slight increase; that motor that you have described had a value a year ago F. A. S. New York, $96; as to the San Juan price, you probably want the price delivered here; that will have to be estimated; we would quote a firm price of $106 delivered in San Juan on that motor; that is the price a year ago; that would be our firm price, selling price, on that particular motor a year ago; we are the only representatives that sell these General Electric motors in Puerto Rico; the price of a General Electric motor 2 H. P., 9.6 amperes, one phase, form C, 220 volts, delivered at San Juan, was $80 a year ago.

I am not acquainted with Century motors other than knowing that it is generally a lower priced motor than ours; I don't know anything about the motor itself, its characteristics, serviceability or efficiency or anything else;

I do know that a Century motor of the same characteristics sells at a lower price; we find them in competition occasionally, and they are generally of a lower price than ours; our selling price of our own motor of the same characteristics of a Century motor No. 787,499, 750 revolutions per minute, 60 cycles, 32-16 amperes, 110-220 volts, a year ago, delivered in San Juan, would be $106, the same figure I gave you a minute ago; our price, a year ago, delivered [fol. 169] at San Juan, for a motor of the same characteristics of a Century motor, 1750 revolutions per minute, 2 H. P., 60 cycles, 21.6 to 10.8 amperes, 110-220 volts, was $80; as to whether I know how the price of the Century motor compares with ours for the same type, I venture to say that the prices maintained by all motor manufacturers varied about the same time and approximately the same amount.

It has generally been my experience that the same differential is maintained year after year; the business is competitive; last year the prices of the Century motors were generally below ours; they generally have been below our prices all the time; the price of our motor of the same characteristics of a Century motor, 3/4 H. P., 1165 revolutions per minute, 60 cycles, 12-6 amperes, 104-208 volts, delivered in Puerto Rico last year would be $57; our price on our motor of the same characteristics of a Century motor 3/4 H. P., 1750 revolutions per minute, 60 cycles, 10–5 amperes, 110–220 volts, would be $41, San Juan; delivered last year in Puerto Rico; the Century motor of that type and characteristics sold at that time for slightly less than ours probably; I have had to examine motors that had gone through a fire, that had remained in a building that had been destroyed by fire; I have seen a good many motors that have been through fires.

As to whether in my opinion any of the motors of the types and characteristics mentioned would be totally destroyed by fire, that is a rather difficult question to answer; there are so many things contingent upon what might happen to a motor; after a fire is over the motor might be completely destroyed; it might be completely destroyed on account of the water; I should think that a motor of the various types that I have been testifying about could not disappear, by reason of a fire that destroyed a building, so that it could not be identified as a motor; we have

never rebuilt or repaired any motors that have been or that have gone through a fire ourselves, but we have had the work done by a firm that does that class of work for us here; a motor, even if it has been through a fire, if not too seriously damaged could be rebuilt by installing new windings in it, provided the framework of the motor itself has not been damaged by falling timber, or anything of [fol. 170] that sort; the windings are of copper wire and may be fused and destroyed by fire and also injured by water.

In my experience I have had cases where motors have gone through fires and have been rebuilt and resumed service; as to whether I can say how the second hand price or the price of used motors compared with the price on new motors in 1932, that is a very difficult question to answer accurately, because it depends on the condition of the motor and it depends upon the desire on the part of the owner to get rid of the motor; as to what a second-hand motor would sell for in the open market, as compared with a new motor, there generally is an appreciable difference; appreciable decrease; of course, a second-hand motor might be sold for about fifty percent of its original value; there is no average of the difference in price; it would be impossible to state an average; a used motor, a second-hand motor, would not have the same or as high a market price as a new motor, irrespective of its condition.

As to whether the motors appearing in the photographs shown to me are the kind of motors that I have been testifying about, they are very much so; the two on the right here appear very much like our own motors; as to the others, I could not identify those; they might be Century or any other kind; these two on the right look very much like our own motors; this first motor on the left, 3 H. P., 1750 revolutions per minute, would have a net weight of about 175 pounds; that does not include the base, that is of the motor only; the motor with base and pulley would be approximately 210 pounds; the second motor on the list would be the same; the next one here is of 2 H. P., that motor complete with base and pulley would have a weight of about 95 pounds; the fourth one is also the same, also 2 H. P.; the next one is a 3/4 H. P., 1165 revolutions per minute; that, with base and pulley, would have a net weight of approximately 110 pounds; and the last one is 3/4 H. P.

motor, 1750 revolutions per minute; that would have a net weight with base and pulley of about 85 pounds.

[The photograph which had been shown to the witness was marked "Identification No. 6 for Defendant".]

[fol. 171] Answering questions propounded by Mr. Travieso, the witness testified further:]

The prices that I gave for the different models of motors are 1933 prices; with reference to Century motors the prices that I have given are General Electric prices; by comparison with the H. P. of the motor I gave the General Electric price; the prices given by me are delivered at San Juan; I mean delivered in the owner's establishment; I don't know whether the motors of Rivera Soler & Company, the plaintiff, were sold by me; I don't even know the particular firm here involved; if these motors were purchased from us here, we probably delivered them right to the establishment of the purchaser; the prices quoted by me include base and pulley; the installation of the motor is not included; we simply deliver the goods in their case; the purchaser himself pays for the installation.

As to whether I can state how many three H. P. motors appear in the photograph that is shown to me, it is not possible to determine that from a photograph; it is impossible to determine what their ratings are, what the horsepower or speeds are; each one of these motors should have a metallic name plate fastened on the side of the frame which should state even after they have gone through a fire, unless the plate has been removed; as to whether those smaller motors are the ¾ horsepower motors, as I said before, it is not possible to determine the horsepower of these motors on that basis; on that list there are two 3 H. P. motors; one is 1150 and the other 1750 revolutions per minute; in other words, the horsepower ratings are identical, the principal difference being in the speed; the lower speed motor would be larger, and I might guess that this larger one here might be ¾ H. P., both of these motors, and this possibly is the low speed motor and this the high speed motor.

In my opinion the two motors appearing on the left-hand side of the picture would be ¾ H. P. motors, but that is merely an assumption; the ¾ H. P. motor had a weight of about 85 pounds, whatever the weights are that I gave;

those prices quoted by me include the two percent local excise tax; all expenses to destination; the cost of installing any one of these motors, assuming that the service line [fol. 172] was already in place and it is merely a question of connecting the motors from the service line to the motor itself through its proper control, I am sure could be done for fifteen to twenty dollars per motor; just the electrical connection to the motor.

[The stock transfer book of the plaintiff corporation is offered in evidence by Mr. Brown, admitted and marked "Exhibit No. 3 for Defendant".

A book containing stock certificates of the plaintiff corporation is offered in evidence by Mr. Brown, admitted and marked "Exhibit No. 4 for Defendant".]

JUAN FERNANDEZ, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown, testified as follows:

My name is Juan Fernandez, I reside at Luna Street No. 94; I am the proprietor of a book store; a store of account books and office effects; I am connected with the firm of R. Cantero & Company; I am one of the managing partners of the house; Jose Rivera Soler & Company did have an account with R. Cantero & Company prior to March 13, 1932; I have the books of R. Cantero & Company with me; as to who was the manufacturer of the books sold by R. Cantero & Company to the plaintiff corporation, as per invoice dated February 3, 1932, we handle books of various manufacturers; the ledger, cash book, inventory book and stock register book, which are Exhibits Nos. 1, 2, 4 and 3 for plaintiff, respectively, are of the same manufacture as those sold by R. Cantero & Company in February 1932; we sold that kind of books during that period.

According to our books we have not sold Jose Rivera Soler & Company other books than the cash book, ledger and journal, on February 8, 1932, what appears in the invoice is the only sale that appears in the record of our company; that is the only sale that appears in the books of our company, on that day, because we sold to them other things on other dates; we had an account with Rivera Soler & Company since the year 1930, approximately; as

to whether, from the time that the account was opened in 1930, down to February 8th, there is any mention in our books of any similar purchase of books of account by Rivera Soler & Company, Inc., I would have to see the [fol. 173] charges in the books; [after examining the books] I don't find any other books noted in the sales, except those referred to.

[Answering questions propounded by Mr. Travieso, the witness testified:]

I have been in this business of selling books and stationery, with the house of R. Cantero & Company, since the year 1925; the firm of R. Cantero & Company has been engaged in selling this type of books since that same year 1925; there are other houses that sell the same kind of books in Puerto Rico; we are not the exclusive sellers of this kind of books; I cannot state that those books that have been shown to me are the same books that appear in that invoice that has been shown to me; those books are just like any other books that are manufactured; there are four or five houses in San Juan that sell this same book, with the same number; the books have no particular marks of identification or registration that would enable me to identify them; those books may have been sold by our firm, but at the same time they may have been sold by somebody else, at some other time; I am not able to state who sold those books to Rivera Soler & Company, the plaintiff, because they have no mark indicating that they were sold by R. Cantero & Company; we have also sold them a stock book; the book of certificates of stock was not printed by us.

Mr. Brown: We have not asked him about that book at all, Mr. Travieso.

Mr. Travieso: I ask him on my own account. It is in evidence.

Mr. Brown: I offered that in evidence but only in order to get all the books in. I asked him, however, only in regard to the invoices in February where four books are mentioned of the same character as this, and I showed him the four books that are on your Honor's desk. I asked him no questions about the stock certificate book.

The Court: Yes, but I think counsel has a right to cross-examine.

Mr. Brown: Oh, certainly, but I didn't want it to appear that this was one of the books that had been referred to in the examination of the witness.

The Witness: Upon examining our books I was not able to find another invoice of books sold at some other time; I have found here some journal and various other books [fol. 174] that they have been purchasing, but identical to these I have not found any other charge.

JOSE MANUEL CANALS, a witness previously called on behalf of defendant, was recalled for further examination, and answering questions propounded by Mr. Brown, testified as follows:

On Monday afternoon Mr. Jose Guindalain took pictures of the premises that had been destroyed by fire in the establishment or factory of Jose Rivera Soler & Company, which they occupied prior to the fire on March 13, 1932; those pictures were taken under my directions; the photographs that are shown to me are the same to which I have referred, taken by Mr. Guindalain under my direction. I called Mr. Guindalain up to go there Monday and I showed him where to take the pictures, and these were the pictures taken; I showed him the points where I wanted the pictures taken; I was there all the time, and the notary public was there all the time; the photographs that I have before me accurately represent the premises and the contents so far as they appear in each one of the photographs, as they existed at the time the photographs were taken; they represent truly and accurately the situation of the debris and the articles that were visible at the time; there are seven different pictures; the photograph shown to me, marked "Identification No. 6 for Defendant", is one of the pictures taken at that time; this picture does represent the way in which the articles were located at the time the pictures were taken.

[Said photograph is offered and admitted in evidence, and marked "Exhibit No. 5 for Defendant".]

All those pictures were taken by the same man on Monday afternoon after the fire; the photograph now shown to me, which represents the exterior of the building de-

stroyed by fire, is one of the photographs taken under the circumstances mentioned by me, that was taken from across the street; it represents the premises of the establishment, the business of Rivera Soler & Company, the building destroyed by the fire on March 13, 1932.

[This photograph was offered and admitted in evidence and marked "Exhibit No. 6, Defendant". Mr. Brown then [fol. 175] offers the other five photographs in evidence and the same are admitted and marked "Exhibits Nos. 7", "8", "9", "10" and "11" for defendant".]

The picture of the front of the building was taken as soon as we got to the premises; then before we made the inventory pictures of the interior of the building, as this, were taken; then after that we took all the motors and put them together in a row and took another picture of them, and then we put the Singer machines in a bunch and took a picture of them, all of them, and so that they could be counted again and to be sure that everything in the inventory was there; as to which of those pictures were taken before we had commenced to make the inventory or disturb the debris in the interior of the building, this one, Exhibit No. 6, was the first picture taken; afterwards Exhibits 8, 9, 10 and 11 were taken before removing the debris; you can see the machines right here as they are scattered all over the place; then the inventory was made, the notary public and the photographer being present all the time, and then we put all the machines together in order to take a picture of them; this is Exhibit No. 7, which does not contain the motors; it contains only the sewing machines; they were all placed together in order to take a picture, and to check the number in the inventory.

Then we looked all over the premises to see if there was any other present, and there was none that was not in the picture, which is this Exhibit No. 7 for defendant; these two pictures, Exhibits Nos. 8 and 9, represent what I describe as the basement of the building, which was the rear part of the building; this picture was taken from this corner, this side, to show the basement looking toward the northeast corner; this is Exhibit No. 9. Now this other picture, which is Exhibit No. 8, was taken also of the basement of the building, and it was taken from the other corner, showing the northwestern corner of the building; so

it is from one side and then from the other side of the basement; this picture, which is No. 11, is the main floor, which was part concrete and part wood; the rear part of it was wood, which was destroyed, and the front part was concrete, and from the edge where the basement started this picture was taken, looking toward the southwest; it shows [fol. 176] the southwest corner, and you can see the safe and the machines scattered all over.

This picture, Exhibit No. 10, shows the same corner, the southwest corner; it was taken closer to the safe shown in Exhibit No. 11; you can see the safe here; this was taken close up; all the machines were inventoried first, all the Singer sewing machines, and then all the motors, and then we moved the debris to find irons and other machines of the sort and remains, pieces of paper and of cloth; with the exception of the sewing machines and the machines that I have listed in the inventory, which is Exhibit No. 2 for Defendant, we found no traces of any sewing machines or machines of a similar character; as far as sewing machines, I am sure that this shows every one that was taken up in the inventory; all sewing machines and other machines listed in the inventory were counted and registered and the style number; I did not find any trace of any other motors, no castings or armatures, except those that I have listed in the inventory; that inventory states everything that was found, except ashes and the pieces of cloth and one book or two that we found there.

[Answering questions propounded by Mr. Travieso, the witness further testified:]

As to what would I call the traces of a motor, if any motor would have been broken or something, I should have been able to find the armature; as to whether if a small motor weighing 75 or 90 pounds had been carried away from there it would not have left any traces, when I was there on Sunday morning there were two watchmen; I got there about ten o'clock on Sunday morning; I understand the fire started about one-thirty in the morning; from one-thirty in the morning until ten o'clock Sunday morning I was not there; I am not able to testify as to what happened from one-thirty until ten A. M.; I don't know whether any sewing machines, motors or implements were taken away by people that got in there when I was not there

and carried them away; after the inventory was made and the pictures taken, there was one machine that we could not identify; we couldn't tell what it was, but we put it down; it was one of these pleating machines; that machine was taken from there to the office and to the Singer Sewing [fol. 177] Machine Company, in order to be sure that what I put in there was correct, and they assured me it was; that machine was included in the inventory, it should be in the picture because it was taken away after the pictures were taken.

When I got there at ten o'clock in the morning the fire had been put out entirely; I was able to go into the debris to start my work; the work of putting together all the machines and pieces of machinery was done not on Sunday morning but on Monday afternoon; the pictures were taken Monday afternoon; it took me all the afternoon and up to six o'clock in the evening to get through with my work on Monday; Sunday morning I went there and I asked whether there was any watchman, and two men came to me, and there was a gentleman there, Mr. Pumarada, who talked to me also, and one of the men said he had been put there by Mr. Simonpietri because he had the building insured, and the other said he was put there by Mr. Rivera Soler, and this gentleman, Mr. Pumarada, said yes, they were put there; they said they were to watch this place day and night, and so I went away and came back the next day.

As to whether the debris that I saw inside the building indicated the character of the property that had been burned, those leaving ashes, so that I could tell whether it was cloth, wood, or things like that, there were pieces of wood, still charred, and partly burned, and there were also some small pieces of cloth not entirely consumed by fire and also some paper; I didn't know much about cloth, but I saw it, and it was just ordinary cloth; I did not see any silk; I saw some material that was like this material in my shirt, cotton goods; practically all the ashes looked as though they were from wood, not much to show from cloth; of course, the small ash you could not tell; the quantity of ashes is shown in the photographs; on Sunday it was about the same, no serious changes; some of the windows were open and some were covered by galvanized iron sheets; there is usually a considerable breeze there, more or less.

F. A. C. HASTRUP, a witness previously called, was recalled on behalf of the defendant, and answering questions propounded by Mr. Brown, testified:

[fol. 178] My name is F. A. C. Hastrup; I reside at San Juan, Puerto Rico; I am an insurance loss adjuster; I have been an insurance loss adjuster, for my own account, fourteen years, and connected with a firm of insurance agents here eighteen years; thirty-two years in all; my residence all that time has been Puerto Rico; my adjustments have covered also the northern coast of South America and some part of Central America, and all of the West Indies; the adjustments made by me are slightly above six thousand, for my own account alone; I have investigated fires where a similar business as that of Rivera Soler & Company was involved at Ponce, San Juan and Mayaguez; I was charged with the investigation of this claim; the fire occurred early Sunday morning of the 13th of March, 1932, but I was out of town and did not return until late that night and didn't know anything about the occurrence until Monday morning when I arrived at the office about eight o'clock; I went by automobile to the scene of the fire and remained there for about an hour, and then I came back to my office, because I heard out there that Mr. Canals had already been commissioned by the agent of the insurance company to take charge of the situation; Mr. Canals is employed by me.

On Monday morning when I went out there I did not see Mr. Rivera Soler, but I saw Mr. Pumarada, who has his residence right in front, not the man who testified here, but his father, the owner of the building, Mr. Paulino Pumarada; and he came over to talk to me and I obtained some information about the kind of business and who the owners were, and so forth, and I learned from him that for a time his son—; I looked around the place and came immediately to my office here, and then had a conference with Canals; I instructed them to take charge of everything out there, the investigation and so forth, and if necessary to engage the services of a couple of photographers, which was done; I instructed Mr. Canals and Mr. Davila, my late accountant, who died in November, 1932, I think it was; several days after the fire Mr. Rivera Soler and Mr. Berrios arrived in the office, handing me communications that the corporation's directors meeting had empowered Mr. Berrios

to take charge of the claim, and that anything we wanted we could ask of him.

At the same time they asked if we could furnish them [fol. 179] with claim blanks, which we did and had a long conference with Mr. Berrios and his accountant, Mr. Wolf, about the kind of business they carried on and how it was done; meanwhile I had also obtained from the agent a copy of the policy and the conditions of the policy. A few days later they handed in the claim and I was very much surprised to see in the claim that they were their own goods, material of their own property, instead of large quantities of material belonging to other parties in the States who furnished it to be manufactured and finished down here; the proof of claim was presented the 23d of March, 1932; I do not remember who brought it in; a non-waiver agreement was executed; the document shown to me is the said waiver agreement, dated the 17th of March, 1932.

[The said non-waiver agreement, with a translation of same attached, was offered and admitted in evidence and marked "Exhibit No. 12 for Defendant".]

I noticed in the proof of claim that there was no mention in it of merchandise of other parties; a few days after that, in consequence of this, I also asked for the books of account and numerous other things by letters which I was shown here a few days ago during this trial by Mr. Travieso; I believe all of those letters are already in evidence; they are the letters that were presented by Mr. Travieso; I wrote more letters than those in evidence, in which I asked for particular information; some of that was furnished, generally by Mr. Wolf coming to the office; the said letters had no answer except through Mr. Wolf, who came to the office; and some of them have been answered by them where we asked for particular information and they have been placed in evidence by Mr. Travieso; the petty cash book I never received, and there were one or two small booklets written in pencil which I did not receive either; as I stated before, I had asked for a cash book and the answer was that they did not keep any cash book.

My question was based on the fact that I found in the general ledger reference to a cash register, the same as

they had a journal voucher register, and a number of times it is mentioned all over the ledger, and it should have been there because they were lacking it, and without it we could not check in any shape or manner the cash transactions, [fol. 180] because the only thing they submitted were abstracts of their accounts with the two banks, the Banco Comercial de Puerto Rico and the Royal Bank of Canada; they claimed they could not submit the cancelled checks, and as these abstracts of account only gave the amount of the check and the date on which it was cashed, but no other explanation of what they had been drawn for or to whom issued and who endorsed or cashed them, it was impossible to reconstruct that part; they didn't furnish me with any check register, but they did furnish me with the stubs of the Royal Bank of Canada for the last two weeks prior to the fire, I think it was.

I also asked for a stock book which I have found in similar cases in adjustments of similar establishments or factories, in fire cases or hurricane cases in 1928 and in 1932 is usually kept, and it is practically necessary in order to show how much material and labor is spent on the already cut material which is being sent them from other parties in New York to be finished here and returned to them; they claimed that they did not keep such a stock book, and I asked Mr. Wolf how they could then tell how much labor and how much thread and other material they had expended on these garments or other articles that they received from different houses in the north; the explanation given me was that Mr. Rivera-Soler contracted at a certain price the finishing of these garments, including the furnishing of the necessary sewing thread and embroidery silk and so forth, and that they had to make their profit and overhead in addition to cost of labor out of that the best they could; I replied to him that that was most unusual, and they would never know except at the end of the year whether they had really made a profit at a certain unit price or not.

The information they gave me was that they did not keep separate accounts for that, and that the only way they knew the material they had on hand was at the end of the year when they made their inventory, but that meanwhile they could not say so. I explained to him that under his policy contract he had insured material of his own, material

of others held in trust or on commission or for repairs or for manufacture, and material such as sewing thread and silk thread, and also the labor on all the material which [fol. 181] did not belong to the corporation, but which they received from the north to be manufactured here or finished here and returned north; he said he was sorry, if I did not find it in the books he could not give it to me, because he didn't have it; I called also his attention to a considerable lot of material that was not being finished in the factory, but was being sent partly to the homes of different people over the counter, and also to agents of theirs in different districts of the island.

How could he tell me, because it had to be found out, not only the materials they had received belonging to others, but the materials that might belong to the firm, and in addition to that the embroidery and sewing thread that they had given to them, and how much they had paid for the work; as to that he also answered that the only thing they had were notations in pencil of the pieces that they sent out; now I positively insisted upon receiving this information as far as the day of the fire was concerned, because otherwise it was humanly impossible to arrive at their value of the stock on hand, of the ownership of the material, or the value, as I did not know how much was outside, be it in the hands of agents or be it in the hands of women workers. I asked for that again for the last time in a letter on the 8th of July, which Attorney Travieso placed in evidence, and they never replied to that nor did they ever furnish it; and without that it is absolutely impossible; those letters are the letter of July, 1932, addressed by me to Mr. Berrios, the man that they had instructed me to deal with; that letter is Exhibit No. 34 for Plaintiff, and Mr. Travieso's answer to that letter is Exhibit No. 35.

That was the end of the requests for information; very shortly after the fire, I was informed by concerns in New York claiming that at the time of the fire they had goods on hand of their own property in the establishment of Rivera Soler & Company, and that this was fully protected under his policy, as he had informed them; that was one of the reasons why I was very much astonished when I received the proof of claim claiming only for his own goods and on the labor of the others, but not on the property of the others; through the liquidating agents, Albert E. Lee & Son, of the defendant company, I was furnished with

two restraining orders duly executed before the corres-
[fol. 182] ponding courts in New York City that no moneys were to be paid to Rivera Soler & Company until authorized to do so by the corresponding courts in New York.

Mr. Brown: I just want to mention in connection with these injunctive orders that this is not a matter that concerns the jury, but if there should be a judgment we should have to file those orders, because the company is enjoined from paying anything on those policies.

The Court: Mr. Brown, before you proceed, I want to make a correction on a ruling that I made on last Friday. After careful study we found another case, and I find I was in error. I think that under the greater weight of the authority a public official who is the custodian of a public record, after testifying that he has made a careful search of his record, may testify that he did not find an entry. My ruling was the other way, so having concluded that, I want to correct it myself and give you the opportunity to make your offer again.

Mr. Brown: It seems so, your Honor, because otherwise it would be necessary to present thousands of documents to prove a negative.

The Court: That is the very ground on which exception is made, the voluminous documents and the inconvenience of searching, and the time taken. If they are not voluminous the weight seems to be the other way.

[The attorneys for the parties, Mr. Brown and Mr. Travieso, stipulate that the officer, if recalled, would testify that the records of the Department do not show the payment of a two percent sales tax on the sale made by Mr. Nieva to the plaintiff corporation.

The attorneys also stipulate that the witness Nazario, the liquidator of the internal revenue, if recalled, would testify that he found no entry of machinery, sewing machines or machinery of like character, brought into Puerto Rico by Mr. Jose Rivera Soler or by the corporation.]

F. A. C. Hastrup, a witness previously called on behalf of defendant, was recalled for further examination and, answering questions propounded by Mr. Brown, testified:

[fol. 183] Mr. Davila, of my office, was charged with the examination of the books and papers that were furnished

by the insured, by the plaintiff corporation; Mr. Davila was my first accountant and died in November, 1932; Mr. Davila reported to me; every time that he had some doubt or found some difficulty he called me in to examine and give him advice, or decide on it, or whether anything else should be asked for to solve such difficulty which I did; that was the reason why I called for the various things that I did call for; I examined the books and documents at that time only at the request of Mr. Davila, when he found any difficulty to proceed; I examined the documents and books that have been presented in evidence here by the plaintiff only after I saw them here in court, because meanwhile Mr. Travieso had asked for the books and they were returned in July of 1932; as to whether or not I have examined them since, only what I saw here in court, nothing else; I was called upon to identify the books which had been received in the office and which had not been received; I have stated that, of the books presented here in the court by plaintiff, the petty cash book was not delivered to me, and two small booklets, written in pencil, had not been given to me.

[Answering questions propounded by Mr. Travieso, the witness testified:]

I had delegated to Mr. Davila the examination of the books in my office, it was his regular business in these cases; every book that is turned into the office in case of a claim, whether fire or hurricane or whatever it is, is examined by me personally together with the receipt which we issue to the claimants who tender the books, and when they are turned back to the claimants the receipt of them on his part is either stated on the receipt which we gave him, or on a separate receipt, if he cannot find our receipt. I went to the place of the fire on Monday morning the 14th of March 1932; on Sunday I was not in town and did not know about the fire; I went there as adjuster, because I had been telephoned by my assistant, Mr. Canals, that he had been instructed by the defendant company on Sunday to take charge of it; I went there under instructions from the insurance company, from the defendant in this case.

It was this insurance company who appointed me adjuster, and my compensation for serving as adjuster is paid by the insurance company; that compensation is based [fol. 184] on time employed; it is not based on the amount

that I am able to reduce the claim; I receive compensation as adjuster exactly the same way that I receive compensation as certified public accountant, strictly by time; that Monday morning I made no other investigation except speaking to Mr. Pumarada, the father of the witness here, who lives right in front; I would not be able to give you information as to the causes of the fire; the investigation of the causes of the fire for the company is part of my duties as adjuster; if I had found from my investigation that the fire had been set by the plaintiff or by agents of the plaintiff I would have reported to the company against the payment of any indemnity to the plaintiff.

X Q. 2. And did you make that report?

Mr. Brown: I object, your Honor, as to communications between the adjuster and the company, which are privileged.

The Court: He stated that he had no information as to the cause of the fire. I assume that he would not make a report of which he had no information.

Mr. Travieso: That is exactly the point I want to establish because one of the defenses is that this plaintiff set fire to the building, and that defense is under oath or it is upon information and belief, alleged by the company. Why did they put up such a defense when the adjuster or investigator did not discover anything?

The Court: I think you may ask him the question.

Mr. Brown: Your Honor will allow an exception? Our position is that any communications between the adjuster and the company are privileged.

The Court: He cannot go into the contents of the communication except to ask him if he reported to the company the result of his investigation, as to the cause of the fire. I think that is proper under the pleadings.

Mr. Brown: Your Honor will allow me an exception?

The Court: Yes.

The Witness: I advised the company that according to my belief it was a wholly suspicious origin, but that I had not found any definite proof to that effect. Mr. Canals made [fol. 185] an inventory of property under my instructions.

JOSE ANTONIO EZEQUIEL RODRIGUEZ, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown, testified as follows:

My name is Jose Antonio Ezequiel Rodriguez; my residence is Stop 27, Martin Peña; I am a manufacturer and contractor; I manufacture ladies' dresses and children's dresses and silk underwear; I have an idea of the kind of business that Jose Rivera Soler & Company was engaged in, but I don't know the details; I do the same kind of business as Rivera Soler & Company; I have been engaged in that kind of business for about nine years on my own account and for about five years previously as an employee of a concern that was doing the business; I am actually engaged in that business now; my factory is at Martin Peña, Stop 27; in my Martin Peña factory I operate about 208 machines, and in factories in the island I operate about 200 more; houses in the States send me material which is to be employed in the manufacture of garments such as you have mentioned and of articles such as you have mentioned.

I should say that in the course of a year I manufacture or turn out between seventy-five and a hundred thousand dozen; I do not have any material left over from the material that is furnished me, because that is sent to me cut; very seldom do I cut their own goods in Puerto Rico; most of the time they cut the goods in the States themselves, and they send me the goods already cut and I have nothing left over. When I do cut my own goods I do have remnants; there have been cases, whenever the conditions are such in the States that they are rushed for cutting they send me the goods for cutting, but not as a regular proposition; I manufacture on my own account as well; I should say that during a year I manufacture about seventy-five or a hundred dozen ladies' garments for my own account; whenever there is any cutting done on piece goods there is always some pieces over at the end; it may be two inches or ten inches, or half a yard or a yard, that you cannot use; that's what we call remnants; in the case of persons, houses or firms sending me material uncut from the States, [fol. 186] those remnants belong to the house that furnished the material.

My experience in this business is that the average value yearly of these remnants is very little, I should say fifty

to a hundred dollars worth; I never manufacture towels or table cloths; in the manufacture of these goods that I make for other people who furnish the cloth, cut or uncut, I furnish the thread only; I should say I carry a stock of threads between a thousand and fifteen hundred dollars all the time; I find that sufficient for my requirements; we make stencils or "patrones" for the purpose of stamping; one of those stencils depending on the quality of the paper that is used in the original, a fair quality of paper, can give you fifteen hundred stamps; after stamping about fifteen hundred garments, if the stencil tears and the same pattern is to be stamped over again, you have to make a new one; we have those maniquies; those maniquies are bought from concerns, from manufacturers that make them, which are called forms; usually they turn out new forms every year, and according to the fashion; the concerns that make a business of manufacturing these forms turn out new forms, new styles, every year: I don't have to purchase new forms every year, I buy new forms every three or four years; I am able to use forms for several years.

In my factory I use Singer sewing machines mostly and I also have machines for sewing buttons and machines with two needles; I have one small pleating machine and machines for cutting; I don't make shirts; I have perforating machines; I am acquainted with the market value of those machines, new and second-hand; I couldn't tell you exactly just what would be the value of a second-hand machine on March, 1932; my experience has been that the market value of second-hand machines, Singers, varied from about forty to fifty dollars for each machine, all set up; with all the accessories; I do not know whether there was any scarcity of second-hand machines in 1932; so far as I know there has never been any scarcity of second-hand machines since I have been in business; I have been in business over nine years; I expect that the percentage value of second-hand machines is fifty percent of the value of the new machine.

[fol. 187] [Answering questions propounded by Mr. Travieso, the witness testified:]

A machine ceases to be considered as a new machine the minute it leaves the factory that manufactured it; as soon as you get it out of the factory it is a second-hand machine; the price of a second-hand machine may vary from a ma-

chine that was bought yesterday to a machine that was bought twenty years ago; that is, a second-hand machine that you bought yesterday may be a second-hand machine today, and the one that you bought twenty years ago is a second-hand machine today also; the price for the machine bought yesterday and for the machine that was bought eighteen or twenty years ago would not be the same; when I testify as to the price of a second-hand machine I don't mean any particular kind of a second-hand machine and I make no special reference to the age of the machine; the price of a second-hand machine is not in accordance with the labor which it can render; there is usually an average; there are concerns that make it a business to deal in second-hand machines; those concerns are not here in Puerto Rico.

When I refer to the possibilities of buying second-hand machines I refer to the continent not to the local market, although they do business in the local market; if you wanted one hundred machines tomorrow to start a factory, you could not buy those second-hand machines locally, you have to order them from the States; during the nine years of my experience as manufacturer and contractor, I have manufactured ladies' and children's dresses from material already cut that is furnished me by my clients in the United States and I have also cut my own goods; my experience as to manufacture of my own goods amounts to seventy-five or a hundred dozens in a year; a very small quantity; as to whether I am more experienced in manufacturing from goods already cut than as a manufacturer of goods that I cut myself for my own account, I should say that I am experienced in both lines, but my volume of business is insignificant on that as compared with the other; but I have the same experience with both; my experience, both in my own business and the contracting business, has been obtained in the last nine years.

The amount of remnants or savings in materials does, to [fol. 188] a certain extent, depend on the ability of the man who cuts the material; however, no matter how experienced the man who cuts, no matter how expert he is, he will have remnants; the most experienced man cannot avoid some remnants being left over after cutting; however, an experienced man, an expert, instead of having remnants of a yard or a yard and a half will have remnants of only a few inches; the better the cutter and the more experience, the

less remnants he will have; as to whether, supposing that a contract is made whereby the person that furnishes the material agrees to a percentage, say for waste or remnants, an experienced cutter can increase that proportion, that percentage, in proportion to his ability to cut, if he increases the percentage then he is not an experienced cutter;

X Q. 1. You don't get my point. There is material, say one hundred yards of material, out of which I am supposed to get one hundred children's dresses.

A. Yes.

X Q. 2. But the owner of the material gives me three percent for waste, and that percentage of waste will be mine, if I save it, if I don't spoil it. But I have an interest in making that three percent or five percent, giving him his one hundred children's dresses. Don't you see how the ability of the cutter will increase the percentage of savings?

A. Savings, yes. You mentioned waste before.

X Q. 3. What the company gives you for waste would be saved?

A. Yes, it would be saving for one party and waste for another. A good cutter will be saving for one party and wasting for the other.

But the other party gets his 100 dresses just the same, which he contracted for.

[Answering further questions propounded by Mr. Brown, the witness testified:]

By the process that Mr. Travieso explains there could be remnants or sobrantes consisting of whole bolts of cloth of many yards, entire bolts. I will explain that. Mr. Travieso puts the question in another way; the remnants in the case of Mr. Travieso would be savings, and would not be waste; in the case of other manufacturers it would be considered waste; but as Mr. Travieso puts it, the manufacturer sends a thousands yards of cloth, he must get 900 garments out of those thousands yards of cloth; if he gets the 900 garments [fol. 189] out of 800 yards of cloth, he has 200 yards of remnants or savings, which may, some of it, be in whole bolts, in whole pieces; houses that send merchandise to be manufactured into garments figure very close how many garments can be manufactured out of the amount of material sent, but sometimes you will get a few garments more out of the yardage that they send, and sometimes you will

not get what they say that you will get; sometimes they send me so many yards and say I can get 125 dozen out of that, and I am only able to get 120 dozen; sometimes I am able to get a few garments more than they claim; as to whether it would be a usual thing that any considerable amount would be left over out of the material that they furnished, I should say it is very very difficult because they figure that very close; they don't give the contractor much of a chance.

[Answering questions propounded by Mr. Travieso, the witness further testified:]

In that last answer I refer to my own experience; I don't manufacture for the same people that Rivera Soler manufactures for, so they may have an experience different from mine; I do not have much experience in the manufacture of table cloths and napkins and pillow cases; I have manufactured some; as to whether I know how the quantity of thread used in table cloths and napkins and pillow cases compares with the quantity used in the manufacture of ladies' and children's dresses, I should say more and less; for example, on ladies' and children's dresses you use sewing thread I should say on an average of 100 to 1, as compared with napkins; but on the other hand, on embroidery threads you would use on napkins and table cloths and other things ten to one as compared with ladies' and children's dresses.

That is, of the embroidery thread alone, you would use a great deal more on the towels and napkins than on the ladies' and children's dresses, but on the sewing thread you see a great deal more on the ladies' and children's sewing, while napkins and those things have very little sewing on them; the thread for embroidery is much greater in the case of napkins; the amount of thread of both kinds used in say 100 dozen table cloths and 100 ladies' dresses, would depend on the kind of table cloth and the kind of ladies' [fol. 190] dresses; I manufacture high class ladies' dresses; it depends on the kind and the amount of work; for example, you may have a table cloth with very little embroidery, and you may have one that is filled with embroidery; you may have a lady's dress with plenty of embroidery and others with less; every factory has a problem of its own, and it is very difficult for a man to apply his personal experience to the experience of others.

WILLIAM ARTHUR WAYMOUTH, a witness called on behalf of the defendant, answering questions propounded by Mr. Brown, testified as follows:

My name is William Arthur Waymouth; I reside at San Juan, Puerto Rico; I am a public accountant and auditor; I am a member of the firm of Sparrow, Waymouth & Company; that firm used to be Robert G. Sparrow & Company with offices in New York and Puerto Rico.

[Mr. Travieso requests permission from the court to have his bookkeeper with him, to help in the cross-examination. The court grants the permission.]

I have been working as accountant for over twenty years, the last eight of which have been as public accountant and auditor. I have engaged in that profession in Puerto Rico for the same length of time, eight or nine years. As to whether I could mention some of the concerns whose books I have examined and audited in Puerto Rico, I am afraid I can't answer that question, Mr. Brown, for professional reasons. I was the auditor, by appointment of the court, of the United Porto Rican Sugar Company, in the United Porto Rican case. Mr. Brown asked me to examine the books and vouchers and other papers that have been presented by the plaintiff Jose Rivera Soler & Company in evidence in this case. I have made that examination. We started to make said examination on the first day we came in here, Tuesday afternoon, and we have been working on them steadily until Saturday afternoon. Mr. Brown asked me to direct my investigation to two principal questions, first, as to whether the books contain entries of a suspicious character, entries that were false, where they had been erased and substituted, whether there had been vouchers [fol. 191] that were not genuine, and also the second question as to whether I could find from those books whether those books and vouchers contained data sufficient to enable me to determine the amount of goods and merchandise covered by the policy of insurance that was on hand at the time of the fire in the factory of the plaintiff.

Q. 1. Now dealing with the first question, as to whether these books and the entries therein are legitimate or not, will you please state to the jury what you found in your investigation and point them out in the books and vouchers at the various points that you covered?

Mr. Travieso: If you- Honor please, I want to object to the witness giving his opinion as to whether an entry in a book is of a suspicious character or not. The gentleman has been qualified and I admit that he is qualified as a certified public accountant, but he has not been qualified as a handwriting expert or as a detective trying to find something of a suspicious character in handwriting or in the entries in the books. I understood that Mr. Waymouth had been offered for the purpose of making an examination and audit of this evidence, these books, to determine whether this system of books is a substantial compliance with the iron safe clause, which is part of the policy of insurance in this case. To permit a gentleman who is not qualified for the purpose to give an opinion as to whether a particular entry that has been pointed out to him by somebody else is suspicious or not, I think goes beyond the limit of expert testimony on the part of an accountant, and I object to the question asked.

The Court: I am not going to let him testify as to what his suspicions are. He can point out in the books, if he has found anything that he thinks of sufficient importance to call the jurors' attention to, and the jury is just as well qualified as the witness to determine whether the book is genuine.

Mr. Brown: I — him to point out to the jury the various entries, the various pages, and show the jury what he found.

The Court: He can point out to the jury what he found in his audit, but I am not going to let him state what his opinion is as to whether an entry is genuine or not.

[fol. 192] Mr. Travieso: Exception.

Mr. Waymouth proceeds: I should have to refer to the books; I may state in the first place that even though we are not detectives, in the public accounting business it is very often essential that we e..ablish the legitimacy of the records, and although we may not be handwriting experts and may not be able to swear or give evidence as to the proper entry having been made, still to satisfy ourselves as public accountants we must satisfy ourselves as to whether the books are correct, and whether we can accept them for the purpose of the work we are to do. Now I will start with the general ledger, which is Exhibit No. 1 for the Plaintiff. As public accountant, when this book is offered to me I do not accept it as the legitimate general ledger. It has too

many evidences of not being the original ledger. In the first place, a ledger that has been used from 1929 to 1932—that would be three years—would have evidence of having been thoroughly used and would be soiled; the index tabs on this general ledger have not been touched. They are brand new. No reference has been made to the index in recording these figures. In the second place, no bookkeeper writes an index more than once.

The first page has been written twice. The "A" and "C" index has been written twice; [handing exhibit to the jury] you can see it on that sheet and the following sheet. The next thing I noticed in looking over the general ledger is the fact that no account shows the customary pencil totals that bookkeepers enter every month at the end of the month when they take a trial balance. It is very customary for bookkeepers when they write their books to make a mechanical proof of it at the end of every month by trial balance, and in doing so they enter at the bottom of the column in pencil figures the totals so far. This book has no monthly totals in pencil except from February and March, 1932, and yet all the other books show that the person who was keeping them was in the habit of taking trial balances monthly, because the cash book and the journal register and the current account book all have monthly totals in pencil. This book has none. Take the current account book, take any account, open them at any account except the account of Mr. Rivera Soler and you will notice they have been totalled [fol. 193] in pencil monthly, with the exception of the first year, which has the total only for the first year in pencil, and for the last two months, January and February.

The rest of the book has no pencil footings during the month. You can particularly see that in the accounts that have many entries, like "Production" or "Listas de pago." Any one of those accounts that have many entries, any of the current accounts, every month they have the little pencil totals showing the amount up to that time. Every month the bookkeeper takes a trial balance; not in this handwriting, because I understand that the original bookkeeper wrote the first six months, but after that every month there are pencil marks. The first book that I called attention to is the ledger; the ledger is the summary book, wherein are entered in classified form as to accounts the entries that have been made in the subsidiary accounts. The entries

in the ledger are taken from the other books. There would be the same reason for putting the pencil notations in the ledger that would be found in the other books. After they have been totaled in the other books, because in the other books they have been totaled in chronological order, and in this book they have been totaled in classification of accounts, and for that reason the ledger is used, to classify all the entries which originate from different sources, into the accounts named here.

There is one other item in this ledger that is questionable. By itself alone I would not put much weight on it, but combined with other facts and with facts that I shall bring out in referring to the other books, it is questionable to me. We have the index. In the index under the letter "M", there is an account entitled "Mercancias Sobrantes", which has been posted to page 27. That is dated 1930, and yet it is recorded on the index after other account titled. If that account had been written here in 1930, it should have been included in the index further up, and not as the last account. As I said before, that by itself is not so much, except in conjunction with the other things that I have noticed. Now there is one other thing I noticed in the ledger that is unusual and that makes me feel that I cannot accept this as a legitimate book. In the first page for the year 1931 has been written over the year 1932, which is an unusual error in accounting or bookkeeping. Usually, if you make an [fol. 194] error of that type, you write the previous year, 1930 for 1931, for instance, instead of the succeeding year, and this has been written in 1932 with a 1 written over the 1932.

I have traced through all the records in here and with one exception every error of a similar nature is like I have just mentioned, that they have written 1930 and corrected 1931. A few errors are 1932 and corrected 1931, and I am in doubt of that. This is a similar one. This is 1932, corrected to 1931. That is as far as the ledger is concerned. Now the current accounts ledger. All the sheets appear to be bona fide, with one exception. The account of Jose Rivera Soler beginning with 1931, to the end of 1932. These—the pages have no number; it is under the index letter "J". There are no numbers. From January, 1931, to December, 1931, these ledger sheets have the same lack of pencil footings month by month that the ledger has. In other words, these three sheets do not have any monthly pencil totals whereas all

the other accounts preceding and succeeding have. In other words, when these accounts were written up there is evidence throughout that at the end of every month somebody has gone through the whole ledger and totaled every account in order to get a trial balance.

But this account has no monthly totals during the year I have just mentioned. Look at the accounts before that and those after it. But my statement must be qualified with the statement that these pencil footings began monthly on May 31, 1930. I was informed that there was another bookkeeper before that, and that all the books for the first six months of the year had been written up at one time. I don't know. There is quite a bit of evidence that that is true, that from 1929 to June, 1930, the books were all written up at once in order to bring the accounting up to date, so that anything in these records back of May, 1930, is not in the same handwriting, but from June, 1930, on every month every account has its pencil footings, except this account from January to December of 1931. In examining the Inventory book, Exhibit No. 4 for the plaintiff, there are a few things that called my attention quite remarkably. In the first place the inventory of December 31, 1930, contains an item "Material in Process, $800". That amount of $800 [fol. 195] for work in process is exactly the same figure that appears in the general ledger after the closing of the books; but for 1931, work in process is recorded at $4,153.50, whereas the ledger figure is only $800, there being a difference between the ledger figure and the inventory figure of $3,353.50.

In comparing the inventory of work in process as between the two years, an examination of the payroll account in the ledger does not show any increase in labor costs. The labor costs are more or less about the same in both years, so as an accountant I would question very much as to why there should be a large discrepancy between the December, 1931 work in process and the December, 1930 work in process. Another thing that is very questionable about that figure in the inventory of $4,153.50 is that the journal entry was made as of February, 1932. The books were not adjusted to reflect the inventory, but there was an entry made almost two months after the closing of the books setting up the entry of the inventory as of December 31, 1931, on which date the books were closed. The date of that entry

was February 23, 1932. Now the reason why as an accountant, this thing is entirely questionable to me is that the balance of $800 comes back from December, 1929. There is no entry on the books adjusting that for 1930, nor 1931, and then in February, 1932, they set up an entry for $4,153.50, which is the exact amount appearing on the inventory book; but the ledger account after that entry is $4,953.50. Apparently the $800 was completely ignored. For that reason, I don't accept the merchandise in stock, the labor on merchandise in stock, as being the correct amount, without further proof.

As to what account is the inventory adjusted to, it was credited to the 1932 cost of production. In other words, the entry sets up on the inventory on February 23, 1932, on the ledger, which is credited to cost of production. Now we have another item on the inventory book which also also in my mind is highly questionable. It is an item in the inventory that is called "Materiales de elaboracion" or manufacturing supplies. The inventory of December, 1930, shows $500. That agrees with the account on the general ledger, $500 at December, 1930. The inventory of December, 1931, has a corresponding amount for that same [fol. 196] type of inventory of $2,324.74. However, on the ledger, when they closed the books they closed it with a balance of $800.

On February 23d they again adjusted the books, setting up supplies delivered during 1931, but credited in February, 1932, of $2,524.74. That $2,524.74, if added to the $800 that the books show, would give exactly $3,324.74, and yet the inventory is that exact amount less $1,000. For that reason that item on the inventory to me as an accountant is highly questionable. That is the inventory.

Now we have the journal vouchers. Voucher No. 829, under date of March 20, 1931, records the purchase of machinery from Dolcey, Inc., in the amount of $2,253.68. This voucher is made up on a different form of voucher from all the preceding and all the succeeding vouchers in that pack. All the vouchers here up to and including No. 1173 were printed by Real Hermanos and have the Real Hermanos name and job number printed on the voucher, all the way through, with this exception and one more to which I will refer. The vouchers are of the Real Hermanos

printing job No. 13,476. This voucher is not of the same printing and this style of voucher did not start until November 19, 1931, which is about eight months later, so this voucher appears to have been inserted in here at least eight months after the date on which it is written.

Another thing which looks different about this voucher is that the wire fastening clip is not rusted. Every other clip in this package is rusted completely in front and in back, so that it can be readily seen that that clip is a fresh clip. The invoice behind it has the corner torn off, almost indicating that there had been a previous clip through this invoice attached to a previous voucher. Now that voucher credits Dolcey, Inc., $1,400, and credits J. Rivera Soler $853.68, with a corresponding debit of $2,253.68 to machinery. Now in the journal voucher 829 was originally posted for $1,400. It is very evident that it has been erased and that the $1,400 can be seen through a magnifying glass under the figure of this voucher. I have here a magnifying glass. This entry was made for $1,400 on both sides of the page, debiting machinery and crediting current account. The current account of Dolcey has a credit of $1,400. Then [fol. 197] the entry was erased and instead of the $1,400 the sum of $2,253.68 was put in. The totals were erased and adjusted to the new amount. The carry forwards were erased. The totals at the bottom of the page have been erased, and in every one of these items $853.68 have been added on.

Now if we refer to the account of J. Rivera Soler in the current accounts ledger Exhibit No. 5, in that same month of March, 1931, and referring to the same voucher of the same date the amount of $853.68 has been interlined between other amounts and the totals have been adjusted as far as the next sheet so as to carry the increased amount of $853.68 forward. Now that erasure is easily seen. That is in the journal record, Exhibit No. 3. That is on the preceding page, at the bottom, under the account "Mayor General", the figure $1,400 has been erased and the other amount has been put in over it. The interlining is on the credit side, March 11, 1931. As to what significance I attach to the fact that on the line appears the same figure that has been changed appears the same figure that has not been altered; tracing that entry back to its origin, it appears that on a certain date preceding the Dolcey Com-

pany had sent them some machinery on consignment or in trust and in other words that didn't belong to the corporation, so they had an account on the books showing machinery in deposit with a credit to Dolcey.

When they bought the machinery they had to offset that entry. In other words, they had them originally on deposit for the same amount of $2,324, which they cancelled by crediting machinery and debiting the Dolcey account on deposit, and that automatically wiped out that deposit account. Then they set up the value of the machines at whatever price they paid for them, or decided to pay for them, which apparently on the records was recorded at $1,400, and then erased that figure and recorded it at $2,300. That was the amount that they carried in the trust account, but when they credited Dolcey they credited $1,400 and the other $800 is given to the credit of Rivera Soler. Now there is another voucher of the same nature, No. 1023, which is dated July 13th, 1931. That voucher likewise is printed on a different form from the current form pertaining to that period. As I said before, this new type of voucher was [fol. 198] not used until November of 1931, with all the other vouchers with the original printing by Real Hermanos, and yet on July 13th voucher No. 1023 is on the new form, and it has the same question about the metal fastener which is not rusted like the others of that same group, so that that voucher by itself, to an accountant first looking at this, would seem suspicious.

Now tracing this voucher to the recording records—first I will explain what the voucher is. It sets up the value of the machinery and furniture and fixtures in connection with additional capital supplied by Escudero, Valloveras and Pumarada, and also a credit to the same account of Jose Rivera Soler. This is the journal voucher record. There is no cash voucher record. General voucher record Exhibit No. 3; voucher 1023, at folio 59, of the journal voucher record. In my opinion, which I will explain how I arrive at, these two sheets are new and have been put in here after the other sheets have been written. In the first place, we have the suspicious nature of this voucher substantiated by the fact that the credit to current accounts on page 59 is in ink without erasure. When carried forward to page 60, on the credit side, the ink amount has been erased and substituted by another figure. The total of

the credit side has been erased and substituted by a new figure. On this side of the sheet, the debit side, there has been no erasure. This erasure can be seen with a magnifying glass to represent the difference of $7,689.92. That amount, added to the figures underneath the erasures, will come to the figures now appearing on the journal.

Another appearance of difference is that this sheet, the credit side of page 60, is in different ink from the debit side of page 60. Now when you write a journal entry you may have a difference in ink chronologically, by dates, but you cannot have a difference of ink on the same entry on both sides of the page. Furthermore, if we look through this voucher register you will find that at the bottom of every sheet the bookkeeper after adding up his debits and his credits in order to see if they balance, has added the credits and added the debits and put little pencil marks in here. At the foot of every month there is a debit and a credit in pencil figures, or what they call the cross-footing of the sheets to see that both footings are in agreement. [fol. 199] All the months but one, and that one I am suspicious of, but I cannot give evidence on that because I have found none. This side of the page has been erased, but this side appears normal. On this side of the page there is no pencil cross-footing, but there is on the credit side. In other words, the same procedure has not been followed throughout.

All these monthly footings appear on both the debit and credit and on this one month there is no debit footing; there is a credit cross-footing. That credit cross-footing,—if you total the three figures at the bottom of this sheet, is less than the total by the amount of $7,869.92, which has been altered on this sheet. Another point why I think this sheet differs from the others is that all the other sheets preceding have little water stains at the bottom of the page. This one has a big smudge, and it is dated July, 1931, and that same smudge appears on the sheet written in February, 1932. This sheet here is dated February, 1932. This sheet here is dated July, 1931, and yet June, 1931, there is no mark on that; August, 1931, there is not a similar mark as of that large water stain, as on the sheets of February, 1932, and July, 1931. The other stains are normal throughout the whole book. In addition to the fact that this voucher is of a different form, that the entry

has been erased on one side and not on the other, and that the footings of the side that has been erased do not agree with the pencil cross-footing at the bottom, that all bookkeepers usually put down, by the amount of $7,869.92, that amount has been debited to machinery and furniture and fixtures and equipment and credited to the account of J. Rivera Soler in the months that his account has no pencil totals by month.

Now on the same journal voucher record, Exhibit No. 3, on December 31, 1930, there is an entry without any number. It is the last entry for the year 1930, and it is entered after the profit and loss closing entries. It is not at all customary in bookkeeping or accounting to make an entry like that because it sets up machinery and furniture and fixtures with a credit to the account of Rivera Soler in the amount of $3,246.02. The last voucher in 1930 is No. 721. The first voucher in 1931 is No. 722. This entry appears at the bottom of the sheet after the 1930 accounts were closed up. Unfortunately, that voucher is not in among the [fol. 200] vouchers that have been submitted so that I am unable in any way to state anything about the origin of that voucher. It is back in 1930, and the vouchers for that year are not here. There is no explanation on the journal, just the entry debiting machinery and crediting the account of Rivera Soler, which can be traced here on the same sheets which I maintain have not been totaled by month.

Now there is voucher No. 1280. This voucher No. 1280 under date of March 1, 1932, charges "Materiales de Elaboración" (manufacturing materials) with $6,314 and credits the current account of Pedro M. Nieva with the same amount. If we examine this voucher, we find that it refers to invoices under dates of February 6th, February 13th, February 20th and February 27th, but the amounts written opposite each date on the voucher do not agree with the invoices rendered by Pedro Nieva for this material. Furthermore, this voucher in writing says that it covers 13,908-1/2 yards of broadcloth, and 5,173-1/3 yards of silk. The total amount of the supporting invoices amounts to $6,116.

That voucher was corrected by No. 1292. Without any explanation whatsoever it just reverses $198 of that entry, and after reversing the $198 of the entry the amount is in agreement with the total amount of the Nieva invoices;

but we still find that the yardage represented by the voucher is not in agreement with the yardage of the materials shown on the supporting invoices, and when we made the calculations of so many yards of broadcloth at a certain price, and so many yards of silk at another price, we found that the broadcloth on one invoice, the multiplication is $15 out, on one invoice for 7,800 yards and on the invoice for 8,207 yards of broadcloth, the multiplication is 22 cents out.

An accountant never drops a fraction like that without reason; these 7,800 yards by seven and a half cents are $15 less than what is shown here. And another thing about this voucher is that it refers to four invoices, and it gives the dates, and yet in referring to one of the dates it refers to the invoices of February 20th, and invoice of February 21st; there aren't invoices of February 20th and 21st. The invoices are of February 6th, February 13th and February 21st. When this was being written it is presumed they had [fol. 201] all the invoices available. The journal refers to specific invoices, of specific dates, with specific amounts. Now those amounts do not agree with the invoice in two cases. It refers to specific yardage, at a specific price per yard. The yardage does not agree with the invoice. Then by subsequent voucher, without any explanation whatsoever, they adjust the total amount to agree with the total amount of the four invoices, but of those four invoices two are wrong by multiplication, one by 22 cents and the other by $15. I referred at the beginning to an account, or rather to a number on the index "mercancias sobrantes", which is indexed folio 27 on the general ledger, but after other accounts which have subsequent dates of having commenced. This is the one, and that one "mercancias sobrantes" has the entry of December, 1931, which I mentioned just before as having been entered without number in December, 1930, in the amount of $1,384. This is the account I have mentioned before.

Now I made reference to an entry on the inventory book setting up inventory for manufacturing expenses 1932 but dated back to December, 1931. If we examine the ledger account of "materiales de elaboración" we find that during the first ten months of operations on this ledger, from March to December, 1931, they estimated a consumption of $4,000 worth of materials, which would work out at a rate of $400 a month. In 1930, taking the purchases and

taking the pending inventory and the closing inventory of $500 which appears on the inventory book, their monthly consumption was $273.61 per month of "materials de elaboración". I think "materiales de elaboración" consists mostly of thread; the greater part of it, anyway, is thread. In 1931 the books show with a pending inventory of $500 and a closing inventory of $800, considering all the purchases, that they consumed at the average rate of $180.66, somewhat less, for the twelve months of 1931; that is the average per month, $180.66.

Now I made reference a little while ago to the inventory book showing an inventory of $2,324.74. For the same items, if we use that inventory instead of the book inventory their consumption has been only $53.63 per month. Now if you compare the 1930 with the 1931 operations, [fol. 202] you will find that the money spent for labor is approximately the same, so the material should be the same, within reason, and you can see that 1930 per books is $273 per month, and 1931 per the books it is $180 per month, so that if you have to put that inventory back at December, 1931, your amount consumed is entirely distorted down to $53 a month. It does not follow the preceding amount. There is another account which also ties in with that voucher No. 1023, and that is the meter deposit. In April, 1929, they appear to have on the books $106 on meter deposit. In July, 1931, by that same voucher No. 1023 they appear to increase it $25. Now in September, 1931, they cancelled the existing deposits when they opened up the Pumarada building, and it turns out that the deposits cancelled amounted to only $105. The difference is not much, only one dollar, but it just puts me in a position to still wonder some more about that voucher No. 1023. It is one dollar out in that account, because I have never heard of an electric meter deposit of one dollar, and it plays in on that.

Now I have one more thing on the inventory of December, 1931; "mercancias sobrantes", I think it is called; they call it on the ledger "surplus merchandise", but on the inventory of 1930 they call it "mercancias" and on the inventory of 1931 they call it "mercaderias". Three different things. The original entry in Mercancias Sobrantes, surplus merchandise, was made under date of December

31, 1931, by that journal entry which I referred to as having been made after all the closing entries of the books. As an accountant I would inquire if there were mercancias sobrantes why they were credited to Jose Rivera Soler and not to profit and loss. That is not for me to explain. They were credited to the personal account of Jose Rivera Soler. However, that account had no movement during 1931 until October, when it shows a credit of $2.25 and in December a credit of $2.

In December, 1931, a year after the original entry, they set up an additional $3,954.65 in the same account in the journal. February 23, 1932, they charge it to this account and it appears in the December 1931 entry. The entry was made in February, although the inventory shows it in December. Now that means that they have had $1,384 for [fol. 203] one year, of mercancias sobrantes, and have only sold $4.25 in one year. On the other hand, if we look at the petty cash book, Exhibit No. 2, we find all throughout the year credits to production or to cost of production for a large number of small amounts, sales of merchandise sold, sobrantes sold, such as sales of one table cloth, sale of two pillow cases; all through 1931. Many of the items included in the inventory as mercancias sobrante have been sold but not credited to the inventory account, but have been credited to other production income, or as a deduction from the expense of production, until February of 1932, when although the petty cash books say cost of production for sale of, and then it has several entries, cost of production for the sale of these miscellaneous items after the word cost of production, in brackets surplus merchandise, surplus merchandise, surplus merchandise, and credited to surplus merchandise instead of to production as was done throughout the year.

There was an entry after the general yearly balance was struck in 1930, of excess of merchandise or mercancias sobrantes, in addition to machinery. This is part of it. The voucher for that entry is not here and there is no explanatory record on the journal. It just says debit merchandise, debit machinery and credit Jose Rivera Soler. The entry implies that he (Jose Rivera Soler) had merchandise that he delivered to the corporation, and that the corporation took it up on the books and credited it to his personal account as an asset. So that in this mercancias

sobrantes account, all through 1931, there were no credits to the inventory account except at the latter part of the year for $4.25 and yet all throughout the petty cash book there are records of sales effected and credited not to the inventory but to production or cost of production. The same type of entry goes clear through. In February it is written exactly alike, cost of production, except that then it is bracketed with the name "Mercancias Sobrantes", and it is posted in the account of "mercancia sobrante". The same type of entry.

I didn't have time to go through and take out all the small amounts, but I can tell you that they range from one dollar to ten dollars of miscellaneous amounts. It is a very small amount. The entry made in February reads as follows: "February 23, 1932, voucher No. 1264, debit Mer- [fol. 204] cancias Sobrantes, $3,954.65, stock on hand on December 31, 1931, credit profit and loss, the same amount." However, the supporting inventory has a detail of the items and price comprising this inventory, totaling $5,334.40, and from that is deducted the amount set up on December 31, 1930, $1,384, net to be entered under date of December 31, 1931, $3,954.65, dated February 23, 1932; I wouldn't say that the journal entry contradicts the inventory entry of December 31, 1931; the inventory entry is five thousand dollars and something and the journal entry is three thousand dollars and something, but the wording used in the journal, when a bookkeeper is writing fast—the entry is only for the amount of the write-up to bring the book figure into agreement with the inventory figure. If they did not sell any (excess merchandise) except $4.25, they should have had on hand what the entry says, $5,334.40, but as I said before all through the petty cash book there are entries for sales of items of one dollar or more which pertain to that inventory, and which were not credited to the inventory account. Furthermore, there are items—we will take, for instance, voucher No. 1261. There is a sale to Simon Rojas in the amount of $39.60, which covers one dozen sheets, $36, two dozen pillow cases, $3.60, with a credit to Mercancias Sobrantes. On the inventory there are no sheets. There are pillow cases, but there are no sheets on the inventory. The inventory is dated the end of the year, but it is set up February 23d; they (the sheets) were sold on February 19th, a month and a half

after the date of the inventory. They had no surplus merchandise, no sheets, on that inventory account. On the inventory they did not have cloth from which the sheets could be made. They had "tela de hilo"; I don't know whether they made sheets from that or not. I couldn't say.

Likewise, on March 1, 1932, there is a sale to the Girl Scouts of one and 5/12 uniforms at $5; I suppose that means 1-5/12 dozen uniforms; on the December 1931 inventory, there are no uniforms; there are children's suits and clothes; it might be misconstrued, and say that there were uniforms when they were suits, but these are at $5 a dozen and suits are twelve and fifteen dollars a dozen. That was credited to "Mercancias Sobrantes". From the books that were turned over to me for inspection, they did [fol. 205] not furnish the complete history of the company's operations. In other words, there are records missing. The journal vouchers prior to January 1, 1931, are not available. In other words, these journal vouchers that I have examined start only at January 1, 1931, and continue until March, 1932. Anything prior to that is not available, to see if they are correctly prepared and correctly entered. None of these vouchers here have any approval whatsoever. In other words, they are just prepared in long hand by the person who drew them up, presumably the bookkeeper, and they were recorded on the books, but there is no evidence on any of them that they were approved by the management of the company. Many of them just state briefly the accounts credited and debited, but without any supporting explanation. In other words, they are just memoranda in journal form of the entries that have been put through.

The payrolls are not available in this file of records turned over to me, so that the only way we can accept the amounts paid is by accepting the entries in the payroll account. We cannot tell whether the amounts are correct or not. In other words, it is impossible to verify the labor transactions from the original payrolls. All we can see are the amounts appearing in the ledger account for payrolls. Now there are many of the invoices which have been put through the books which are not in the name of the corporation. Materials purchased, for instance. The vouchers, the invoices, are made out personally to Jose Rivera Soler. Presumably they cover supplies sold to the

company, but you cannot tell whether they were personal purchases for himself or whether they were for the company, because the bills are made out to himself personally, and they are passed through the company's books. There are any number of payments from the petty cash which have no supporting evidence whatsoever. In other words, it just says paid out, or payment tickets for production, ten dollars. Tickets for production at the plant. That probably means labor. It just says production payment at counter, $55; so that, although entered in the petty cash book there is no further explanation than that. You have to accept whatever the petty cash book says. There is no evidence to show what it comprises.

[fol. 206] Then the cancelled checks are missing and the check register is missing. There is no record like there is for the journal voucher of what checks were issued and to whom and for what purpose. There is consistent mention made throughout the ledger with reference to postings which originated in the check register. The ledger, for instance, when they post they will refer to a journal register and they usually state, they either leave the letters in blank and put the number of the voucher, and you can trace it to the voucher, and in that way you know it is a voucher entry, or they say "REJ", which means "Journal Register", and in between there there is "REJ CKS", which means check register. So that throughout the whole ledger there is constant reference to either the journal vouchers or to another record which from those symbols usually mean check register, and it must mean a check register, because the posting from here refers to a regular enumeration entirely distinct from the journal register, and it would only indicate one thing, and that is that there was another book from which these items were posted because in many cases not only does it refer to this number with the symbol "REJ CHKS", but it also refers to the check number, in many instances.

So money payments originating through checks cannot be traced from the checks or check register to the ledger. Those payments are untraceable. If the entries in the check register were bona fide, I could trace these payments, because the usual procedure is when a check is drawn or when a check is issued, you either have a check voucher for it like a journal voucher or you make the entry in the

check stub book and use that as a voucher and post from that to the check register, and then meanwhile every month you would summarize the check register and post it to the ledger account. Now, in this case there are a few check stubs, but they date only around February and March, 1932. Those are the Royal Bank of Canada stubs, Exhibit No. 8; these are the only check stubs that are available, but the checks I have not seen and I don't know whether they exist and all the checks on the check stubs prior to that and all the check register sheets are not present. They were not given to me, and the same way the cash book covers only a period from January, 1931, on. [fol. 207] That record is incomplete as regards that, and as regards the supporting vouchers, which I have already stated I had not seen. With what I have seen there is no way of checking the petty cash book entries from any of the data furnished; if the petty cash vouchers are in evidence I have not seen them. I have seen Exhibits 1 to 10, 13 and 15. I don't know what the others are. There is one way that you can make an attempt to prove some of the payments; by comparing the bank statement with the ledger account you might be able to tra[illegible]ny checks that were for specific amounts, as for instance a check that ended in odd cents. If you found that check on the bank statement and found that same item on the ledger you could suppose that they referred to the same thing, if they were about the same time, but you would have no proof of knowing that the entry in the ledger account was properly recorded, because if you did not know to whom the payment was made, if your check is missing, all you have is an entry in the bank statement with no number and no date of check nor any name of payee, and you could not be positively certain that that same check which appears in any one of the accounts in the ledger was actually paid for that purpose.

What I mean is this: If you have a $50 check on the bank statement and you have a $50 charge in the man's account, there are so many $50 checks that you could not say which one was for what purpose. Still, if you had one check for $199.12, and you found an entry of that corresponding amount on the bank statement and also charged to, say, merchandise purchases, the mere fact that it was the same figure, you could not be 100 percent sure that

that entry on the bank statement for $199.12 was actually and truly chargeable to that account because the check may have been issued for that amount in the bank's favor, but it may have been for some personal purpose, and yet the mere fact that it is charged in merchandise or production or anything of the sort you can never be sure without seeing the check and tracing it through the check register and into the ledger that that disbursement which the bank had paid was really applicable to the account to which it was charged. I would have no means of ascertaining the actual payee of the check nor the purpose of the payment, and not only that, but if the books were correct [fol. 208] 100 percent there are many things that you could assume, and an accountant might be justified at times in assuming that if the check was entered to the cost of production, that the full charge was entered to cost of production for a certain figure, and that same amount appeared in approximately the same date in the bank statement, you could almost assume that that disbursement was for that particular purpose.

But the records that I have examined contained quite a number of entries which as an accountant I considered wrongly recorded, so that I would not be justified in assuming the correctness of an entry which could not be verified when I am not positive about all the entries that have been entered. In other words, if every entry that you can trace you can assure yourself as an accountant is correctly recorded, and you cannot check the other entry, you can almost assume it is correct. But the entries which have been made, there are a number which are not proper from an accounting standpoint and so I would not assume anything on the ones that are not traceable. There are a number of entries which I believe to have been wrongly made. In the brief time available I could not make an analysis of every single entry and trace it through the books, but I did list a number of items which satisfies me that there are any number of incorrect entries recorded in the books; in the first place you can look through the records and you can find many invoices received by the company and entered months after the dates of the invoices. In other words, the books were not maintained carefully up to date to reflect all the expenses nor all the liabilities.

We made up a list. Here are about twenty vouchers or twenty invoices for amounts ranging from fifty cents to $344, which do not apply to the day on which they are recorded. In other words, you can take one voucher, No. 1241, dated January 29, 1931, in which they are recording an invoice received from the Handcraft Import Company for $344. That invoice is dated December 16th, 1930, a month and a half before. A month and a half is not very much, but December 15, 1931—I made an error, the date of the voucher is January 29, 1932, not 1931. The invoice is dated December 16, 1931, and applies to and should affect only 1931 accounts. And yet it is entered in January, 1932, which means that the closing entries as of De- [fol. 209] cember, 1931, were wrong by $344. Here is another entered in March, 1932, voucher No. 1305, from Henry Bloch. That amounts to only $1.13 and $3.23, a total of $4.36. Those invoices are dated December, 1931, and yet they were recorded in March, 1932. That also affects the previous year's operations and has nothing to do with the year in which they were recorded.

Here is another one, from Cantero, voucher No. 776, dated December, 1930, $25.75, entered in February, 1931, two months later and in the subsequent year. Now here is another one that does not affect the operations of the year, but it affects the month. Voucher No. 1061 from the Handcraft Import Company for invoices of March, 1931, amounting to $157.32. That was not entered until August, 1931, about five months later. So there are any number of vouchers picked at random which show that the entries were recorded months after the material was supplied or the invoices received, or the services rendered, so that you cannot assume that everything else is in the proper date. Then besides at random I have picked out a number of charges to also show that the entries on the books cannot be used as a basis for taking averages.

If you have missing records, you can almost reconstruct them if you can assume that what is on the books is correct. You can take averages of cost of production for four years and take an average of what it cost for material and labor, and in that way reconstruct your inventories or materials in process, but the moment you find entries in the accounts that from an accounting viewpoint are wrongly entered you cannot take averages on the other things. Now you

take for instanc . voucher No. 943, dated May 29, 1931. They are crediting cost of production with $35.87 for cancelled checks. Now some of those checks apply properly to 1930, so they have absolutely no connection with the cost of production in 1931. The same way with voucher No. 972. In June, 1931, they credit general expense $19, referring to a cancellation of a credit of Morris Greenberg in 1930. Now that $19 has no connection in 1931 with general expense; it refers to the previous year. And you can take voucher No. 965; in June, 1931, they credit general expense with $18 cancelling a check drawn in 1930 for $18. That cancellation has nothing to do with general ex-
[fol. 210] pense in 1931, and yet the check which appears attached to the voucher is dated May 15, 1930, and was never signed. It is just attached to the voucher as being cancelled.

You can take voucher No. 1257, February, 1932. They are crediting cost of production with $45.02 for checks not paid by the Banco Comercial. The cancellation of those checks, or the writing off of those checks in February, 1932, has no connection with the operations of 1932, because they refer back to 1931 checks. Now you take voucher No. 1277; on February 29, 1932, they journalize the petty cash receipts. Those receipts appear in the journal for $395.34. The petty cash book shows only $392.34; the ledger account shows $395.34, but the total, the footing of the ledger account is $392.34. The ledger account is not footed right. Even the footings are wrong on that account. Then you have on the ledger, folio 78, an account opened in December, 1930, for production of handkerchiefs; $28.17. In March, 1930, after a year and three months, it is still on the books. It has not been written off.

In glancing through the journal we traced the numbers of the drafts that have been drawn on the New York buyer for the merchandise shipped to them. Two drafts are missing. I could not locate those numbers, and I don't know whether they had a draft register or not, but draft No. 321, which was drawn some time between January 14th and January 21, 1932, and draft No. 334, drawn on February 13, 1932, do not appear on the voucher entries recording the drafts that were drawn. It is possible those drafts were cancelled, torn, or never issued, but we cannot say that unless we can see the draft stubs. Those

numbers are absolutely missing. Now you take another one here, on voucher No. 937, May 21, 1931, they credit Rivera Soler and charge travelling expenses $69 and it refers to a check that was drawn in March, 1929, two years previous. That item of $69 has nothing to do with 1931 traveling expenses. So that those errors picked at random from the books would make an accountant hesitate to build up an inventory from the records of production.

Now there is another one, too, that I just remembered. The entries are not always entered under the same account for the same purpose. I mentioned this morning credits [fol. 211] through petty cash for sales of Mercancias Sobrantes (surplus merchandise), which were recorded during 1931 to the account of production, or cost of production, and in February, 1932, they credit it direct to the inventory account of Mercancias Sobrantes. Now when they set up the inventory of Mercancias Sobrantes on February 23, 1932, but applicable to December, 1931, the account credited—I didn't mean Mercancias Sobrantes, I meant work in process. That is folio No. 7. The work in process account, when they wrote off the opening inventory of March 1, 1929, when these books were opened there were $815.15 in the inventory and that was written off and charged to cost of production. In other words, in creasing the cost of manufacturing the goods. On the other hand, when they wrote off on March 18, 1932, $2,429.50 for the merchandise consumed from January 1, 1932 to March 18, when they wrote that off, they charged it to the production account, in other words diminishing the income.

In one entry they increase the expense and in the second entry they diminish the income. Both naturally would result in a charge to profit and loss, but it prevents the proper use of the annual totals for expenses to be able to compare that year with another, because the same entry has been handled in different ways at different times. So you cannot use percentages on that basis. In addition to that the stock ledger, merchandise, stock ledger Exhibit No. 6, and it appears to be the merchandise delivered to agents, in which they keep by units and by style the goods returned, now if this book, if you can be sure that this book was correctly kept you could almost tell how much merchandise is out of the plant, delivered to the agents to do work on it and return it. That also was a large job which

I could not handle complete, throughout, so I had to take at random different accounts and examine them.

Now I find from the check stubs, Exhibit No. 8, a large number of payments which were made to the agents for work delivered from February 27, 1932 to March 18, 1932. There are thirty-six checks in this group of stubs, which were issued for merchandise, because they all refer to liquidation number so and so, and so and so. Of those checks, three of the persons named do not appear in this [fol. 212] book, so that it is impossible to know what they were paid for. Genara Seda Rivera was paid $9.58 on March 1st, and on March 2d, A. Zeppenfeldt. Those are checks or check stubs I should say, in here, but nowhere in the book can I find those people as handling any merchandise for this outfit. The check stubs do not show the purpose for which the check is paid, except that it says liquidation number so and so, and throughout this book wherever it refers to liquidations it refers to this book here, and that is the only connection between the check stubs and this book. All of them refer right through, and have the number of the liquidation right here, every account refers to liquidations, and of the 36, 33 are traced right here in the same way but three of them do not appear, so that means there must be another book or else for some reason they have not been entered, and the record is incomplete.

In this agents' stock record there is an account with Rosa C. de Maldonado, at Utuado. Now there is a letter attached to it in which this lady, under date of March, without any day being stated, says that in answer to their post card calling for all the clothing that she has, she says: "I have no more. You have them all." She denies having anything for account of these people, and yet in pencil figures on her style number 208, 35 by 35, there is a notation appearing to show that they sent her seven, which means seven dozen, which agrees with the corresponding column on the sheet showing the deliveries made to her, seven dozen, style 208. Yet on this side of the sheet showing the returns from her there is also a pencil notation showing that she returned 6-1/12th dozen. It shows that there is a discrepancy of eleven units between the issue and the returns, and yet she claims that it is all correct.

That is just one item. In checking that further, we can take that same lady's account and in style No. 203 she was charged with eight dozen, she returns nine dozen and three units, or 9-3/12th dozen, a difference of one dozen and three units.

On style No. 306 she is charged with 13 and 9/12th dozen, and she is credited with 13 and 2/12th dozen, a difference of 7/12th dozen. All these have been ruled off, indicating that they are true. On style 204 she was credited with an average of 1/12th dozen. On style 210 she is charged with [fol. 213] five and 10/12th dozen, and she is credited with seven and 8/12th dozen, a difference of one and 10/12th dozens. On style 203 she is charged 13 and 4/12th dozen, she is credited with 13 and 1/12th dozen, a difference of 7/12th dozen. That is in just one account. In addition to the difference in this letter which she claims not to owe any more, but which is still owing on the books, in this account alone there are five errors ranging from one piece to one and 10/12th dozen. Then I just took at random another account, that of Carmen Vilches, of Comerio. There is a post card here attached to her account that was mailed on December 4, 1931, and in that card she states that the invoice covering style No. 502 read eight dozen, and she only received one dozen, a difference of seven. Now the entry on the agents' account for style No. 502 was for two dozen. She says the invoice was for eight dozen and then it is written right over it, according to her post card, one dozen.

Now as regards the other items, in addition to this claim of hers in the post card, style 2014, she claims that they remitted to her 14 and 4/12th dozen and it is ruled off after her delivery of 14 and 3/12th dozen, one piece missing. On the other hand, style E, 18 by 18, she has four dozen charged against her and she returns four and 6/12th dozen, or six units over. Style E 16 and ½ by 35, she is charged with four dozen and she is credited with 7 and 2/12th dozen, an overage of 3 and 2/12th dozen. Style 210 she is charged with six dozen and she is credited with six dozen and one piece, an overage of one piece. That means that in addition to the claim in her post card there were four other styles erroneous. We continued with that test at random and there is an account of Elvira Borges de Isern, at Humacao. I won't read all the entries, but there are five styles in that account in which there are

differences. Rosa Becerril, of Rio Piedras, five of the styles do not balance, and are in error. Ana Tru, of Comerio, seven of the styles are in error. So in just five accounts, which were selected at random, there were anywhere from five to seven styles in which the deliveries and the returns did not coincide. So on that basis we do not know how much material could have been on hand.

[fol. 214] As to whether there is any possibility of ascertaining how much work or merchandise passed over the counter and was out at the time of the fire, I don't see how there possibly can be, because the only entries that I noticed of merchandise over the counter are these petty cash disbursements for payments applicable to material coming in. When they return the work they get paid for it, but it does not say what person brought it in, and it doesn't say what type of garment it was. Now they do have a record book here, Exhibit No. 9 for the Plaintiff, of the Handcraft Import Company, showing what they were supposed to have of each style belonging to the Handcraft, and they have also another one here, which is Exhibit No. 10, which covers Jacobsen and Bloch and the Modern Infantwear, but there is no record that I can see of the merchandise handled for the Madeira Linen Importing Company or for Morris Greenberg or the Japanese Importing or any of the other firms with which they did business. This covers only four, and all the cash paid out over the counter, it doesn't say who it is for.

I can read you one of the last ones entered. Take for instance here February 27th, which just says charge cost of production $99.52 as per vouchers of the counter. Now there is no way of knowing unless you saw those vouchers whether it applied to the Handcraft material or whether it applied to Jacobsen material or the material of any of the others who had supplied this amount of goods, and for which I have found no records. There is no evidence as to the amount paid out over the counter, unless it is included in that agents' book. I don't know if that includes all of the payments that went out. I just mentioned two checks that did not go into the account. It could be that the amounts that went out over the counter were to individual workers who took out goods to be worked upon in their homes, but I could not assert that because there is no evidence to show to whom they gave the stuff. In that ledger

there are not two accounts of Mr. Rivera Soler, that is in the current accounts ledger. That ledger has the controlling account of all the current accounts, but the detail appears in the current accounts ledger; that just shows current accounts. Now I remember. Yes, there was an opening account, an opening figure.

[fol. 215] Q. 2. Now on page 5 of this ledger Exhibit No. 1, you find Materiales de Elaboración, that is, material for manufacture, which has an entry as of January 1, 1932, $800. That balance as of January, 1932, in this ledger, is taken from where, if you know?

A. It is stated there to be the balance on hand after the transfer of $2,167.96 to operating profit and loss. Presumably that was the inventory on that date.

Presumably that was the inventory on that date, December 31, 1931. As to the ledger entry of February 29, 1932, of $2,704.83, that entry comes from journal voucher register page 74, in which they charged Materiales de Elaboración $2,704.83. That is made up of three vouchers, voucher No. 1266, dated February 23, 1932 in the amount of $2,524.74, for thread supplied by Mr. Rivera Soler, up to December 31, 1931. That is what the voucher said, $2,524.74 for thread furnished by Mr. Rivera Soler up to December 31, 1931. Another voucher supporting that entry is voucher No. 1273 in the amount of $152.13, covering nine invoices from Sucesores de Blanes, the Spool Cotton Company, in the amount of $152.13. That is dated February 29, 1932, but the invoices have various dates ranging from February 1st to February 25th. Then there is also voucher No. 1274, dated February 29th, in the amount of $27.96, for merchandise purchased during January and February from Morris Greenberg, Maria Luisa Arcelay and Max Pollock & Company. If the inventory had been properly taken it would have shown anything remaining from the amount of thread to which that voucher of $2,500 and some dollars refers. If this $2,500 worth of thread had been sold by Mr. Rivera Soler to the corporation in February, and assuming always the correctness of the inventory, that amount would have had to be added to the inventory amount. If he delivered it after December and it was an outright purchase from him, why in February they would have had the inventory, plus the purchase, less what they

consumed. It would have been $2,500 plus the inventory figure of $2,324, less what would have been consumed in the meantime, in January and part of February. I think the ledger shows.

They have made an entry under date of March 12, 1932, [fol. 216] which entry claims to be for the amount of thread used between January 1st and March 12th, but it has no explanation of how they arrived at that amount that was consumed. The amount is $312. There is no way of verifying the amount of thread consumed during that period, unless they kept a record of thread with requisitions and values. If the amount of thread shown in this inventory of December 31, 1931, valued at $2,324.74, was on hand on December 31, 1931, and Mr. Rivera Soler furnished the corporation in February another amount of thread in the amount of $2,500, that purchase added to the inventory amount, less the amount they claim to have consumed, should have been on hand. That would have been approximately $4,500 and some dollars, but that inventory does not agree with the amount on the books, which is only $800.

In the inventory purporting to have been taken on December 31, 1931, mercaderias or merchandise is shown in the amount of $5,334.40. In the ledger there is no account headed "Mercaderias", or appearing in the index under the title of mercaderias. There is an item of mercaderias sobrantes, or merchandise left over. The ledger entry of February 23d, of merchandise left over, $3,954.65, refers to voucher No. 1264. The voucher says, February 23, 1932, voucher No. 1264, debit merchandise left over $3,954.65, stock of merchandise on December 31, 1931, credit profit and loss $3,954.65. It has a supporting paper that is headed "Inventory of merchandise left over on December 31, 1931". It lists the different items, and the total is $5,334.40, and from that they subtract the charge of December 31, 1930, $1,384, to charge under date of December 31, 1931, $3,954.65, which is the difference between the two figures. It is dated February 23, 1932.

That is, they deduct from $5,334.40 the item in that amount for merchandise left over, appearing in the December 31, 1930 inventory. That does not mean that if that was deducted it was not there on the 31st of December, 1931. As an accountant, in reading that voucher, I would understand that to mean that they took an inventory on

December 31, 1931, and had a certain amount of merchandise left over which they gave as $5,334.40, and inasmuch as they had already charged said account in their [fol. 217] ledger with $1,384 the previous year, they have to charge the difference to bring the book into agreement with the inventory. I only discovered $4.25 credited the latter part of 1931 to this account.

Q. 3. What I cannot understand, Mr. Waymouth, is that this $1,384 of merchandise left over existed on the 31st of December, 1930, and it had not moved as appears from the books, except for some very small amounts, as you have stated; it should have formed a part of the merchandise that was inventoried on December 31, 1931, shouldn't it?

A. According to that entry, it does. It forms a part of a larger amount.

The inventory states that there was $5,334.40 worth of this merchandise left over on December 31, 1931. The increment of three thousand and some odd dollars was the amount of the entry to bring the amount already entered the previous year up to the total of $5,334.40. There is no way of ascertaining what was left of this amount of merchandise at the time of the fire. I could not understand that this figure of three thousand two hundred odd dollars, which was entered in the ledger on February 23d, could be intended as a correction of the inventory figure. It says there inventory. It says clearly that this is the inventory of surplus merchandise on December 31, 1931, $5,334.40, and they deduct from that the amount set up the year before, and the difference is the amount on the books. This amount seems to be the difference from the amount of the year before, or the merging of that item into the larger amount.

The setup as it appears on the books indicates that on December 31, 1930, there were $1,384 of physical account. That during 1931 there was no movement in the account, and an inventory taken on December 31, 1931 showed the value as at that day $5,334.40, or it would mean then that the original merchandise which was set up on the first inventory was still in stock at the second inventory, plus additional amounts left over during the following year, to bring it up to five thousand and something, and that that stock was still there and had been there for a year untouched. As to whether it was possible that there might have been increase in value in this stock left over since the previous

year, there is nothing stated about increase in value; it is [fol. 218] increase in units. You can compare the inventory and see that in December, 1930, they had sixteen dozen pillow cases, and on December 31, 1931, they have 97 dozen pillow cases, and all the way through the same.

The last item for instance is 37½ dozen towels in 1930; in 1931 they had 155 dozen towels. There is just an increase in quantity, at the same prices, by units. Before making the entries of these write-ups in inventory, we just commented on the write-up on the inventory materials for manufacture, it showed $471 as the amount appearing on the books here, after the bookkeeper ruled off his books and showed the result of operation for 1931; $471 is net profit. Then to that is added in February several items covering a transfer of accounts, writing off bad accounts and closing out of other accounts, the write-up in the inventory of merchandise and donations by Mr. Rivera Soler, bringing it up to $9,000. The net profits were not $9,000 because I don't know what the donations of Mr. Rivera Soler apply to, whether it is for this year or the previous year. The books show that they closed the year 1931 with a profit of $471, and then to that they had to add this increase in inventory of approximately——

If you want, in a minute I will read you what the profit and loss account says here. Closing out of all 1931 operations and ruled off just like anybody ruling off a set of books, it shows a profit of $471. By voucher No. 1251, they show as a profit the closing out of a credit balance in the account of Escudero, Valloveras and Pumarada, $86.72. By voucher No. 1264 under date of February 23d, increase in inventory of surplus merchandise, merchandise left over, $3,954.65. By voucher No. 1268, a credit to profit and loss of $2,695.03, as a transfer from the personal account of Mr. Rivera Soler as a donation to the company. Under voucher No. 1278, March 1, 1932, $1,795.08 as another donation by Mr. Rivera Soler to the company. It does not say whether it is applicable to 1931 or to 1930 or to 1929. This donation was not in cash, it was charged to his current account, which had a credit balance. That is, he forgave a part of his indebtedness to him.

Then under voucher No. 1302 there is a credit to profit and loss of $4.60, for two small items closed out, credit bal- [fol. 219] ances apparently not claimed. Now all those

items together give a total of $9,007.08. Against that they wrote off voucher No. 1299, additional compensation to Mr. Rivera Soler $293.02. Voucher No. 1301 writing off without any explanation, presumably because they are uncollectible, but it does not say why, current accounts in the amount of $247.85 and in voucher No. 1303, a similar entry for $79.37; no explanation, just writing off these accounts. And in voucher No. 1310, writing off $39.60 of the account of Simon Rojas. As to whether that was the purchase of sobrantes that Mr. Rojas made, I do not recall them. Looking at the ledger Simon Rojas was charged by voucher No. 1261 for certain merchandise left over in the amount of $39.60; and by voucher No. 1310, without any explanation, he was credited with $39.60.

You see, there is one of those items that an accountant would offset one against the other, presuming that they mean the same thing, but there is no explanation to say that they actually wrote off those sheets and pillow cases in the sum of $39.60. I have here the amounts of those two donations by Mr. Rivera Soler; as to the entry dating back to 1929, which is on the general ledger, there is no evidence on that other than what the ledger and the journal register say, because that dates back to 1929 and all the vouchers of that year are missing. I will trace the amount through the entry. On the ledger he is credited on March 1, 1929, with $1,507.36. The explanation of that is, on the journal register a credit to his personal account for money on deposit at the bank on February 28, 1929. The preceding entry is the incorporation entry where certain items of machinery, movable equipment, materials and so forth and current accounts are turned over to the corporation for six thousand dollars in capital stock, but the cash in Banco Comercial was credited to his personal account. Then on the 31st day of the same month, journal voucher No. 18, there is a credit to his personal account of $20 and a charge to petty cash, presumably money that he put into the petty cash from his pocket, making a total of $1,527.36. That appears on the general ledger. Then by journal voucher No. 168 this account was debited, thereby closing it out on the general ledger, and credited to cuentas corrientes (current accounts) for the total amount, and in the current accounts [fol. 220] ledger on the same day on which that transfer is made on this ledger there is a credit to his current account of the same amount of $1,507.36. That does not start his

current account. His current account has about six pages of entries and then the transfer, the amount on the general ledger, which is the equivalent of cash delivered to him, to his credit, on the current account ledger. That is the history of the general ledger account.

This is his current account ledger account. The account as it appears on these ledger sheets comprises the period from March 1st, 1929 to March 18th, 1932, or a period of three years and eighteen days. An analysis of this account as it stands, and as it states on the sheets for the total amount of that period, shows the following: Debits: he is charged with cash delivered to him or payments made for his account by the company or from the company funds, and these payments comprise any number of payments,—Auxilio Mutuo, garage bills, Commercial Investment bills, interest to the Banco Comercial, light bills, cash delivered to him, Dr. Del Valle's bills, drugstore bills, and everything that was paid for his account, totaling $17,301.84. During the whole period; that does not include salary, that is cash delivered to him or cash paid out for his account. In addition to that his account is debited with ten thousand dollars for additional stock taken out by him in February, 1932. In addition to that his account is debited with $4,490.11 covering the two donations which I mentioned a little while ago. They were charged to him, making a total charge to his account for the period of $31,791.95.

Now the credits to his account for that same period are made up as follows: cash received from him, or cash delivered to the company by others for his account, $2,917.21; salary credited to him, $7,900; additional compensation credited to him without any further explanation and no authority about it whatsoever, $1,188.14; good will $2,000; machinery and equipment, $9,731.94; merchandise left over, $1,384; allowance for travelling expenses $900; sale of ten shares of his original stock to Escudero, Valloveras and Pumarada $1,000. The difference in the machinery purchased from Dolcey,—the bill for a certain amount and Dolcey got credit for $1,400, and Mr. Rivera Soler was credited with $853.68. Distribution of profits from prior [fol. 221] years $2,171.22; manufacturing supplies furnished by him, $2,524.74; making a total of credits of $32,570.93, leaving a balance on March 18th, 1932, when the books ceased, when the entries ceased, a credit balance of

$778.98. That is a recapitulation of all the entries in his account.

The monthly balances can be ascertained from the pencil totals up to a certain figure; the other monthly balances I did not write in in pencil totals. The monthly balance on May 31, 1930, which is the point where it appears the books were brought up to date when they were originally started was a debit balance of $1,862.15. I mean by debit balance amounts that he had drawn from the company in excess of his credit. In other words, he owed that much money to the company. On June 30, 1930, $2,507.64 debit; July 31, $2,977.54 debit; August 31, 1930, $3,485.60 debit; September 30, 1930, $3,787.23 debit; October 31, 1930, $4,250.28 debit; November 30, 1930, $4,631.50 debit; December 31, 1930, $706.33 credit, from a debit of $4,631.50 it becomes a credit of $706.33. They credited him $400 for traveling expenses, $2,200 for salary and $3,246.02 for machinery, equipment and merchandise left over. That was December 31, 1930; January 31, 1931, a credit balance of $330.79 and from then on there are no footings. The credit of $2,000 for good will was entered February 29, 1930.

The dates of the principal machinery credits were already in. The principal one was in July, 1931. The payrolls as shown on pages 58, 59, 60 and 74 of the general ledger, Exhibit No. 1, their weekly payrolls fluctuated from $180 to $400 as a maximum. I worked it out here on a monthly basis. In 1929, the ledger sheet shows that for the ten months from March 1st to December 1st they had a total payroll of $13,351.31, or an average per month of $1,335.13. The 1930 payroll as appears on the ledger amounted to $18,428.93 or an average per month of $1,535.74. The total payroll for 1931 amounted to $18,738.26, or an average per month of $1,561.52, for 1932, two and a half months, a total of $2,559.83, or an average of $1,023.93 per month. I have no way of knowing whether these payrolls included all of the office salaries, but I can read you one voucher at random, No. 1275, and give you an idea what it says: voucher [fol. 222] No. 1275, debit cost of production $973.90, administration and general expense for employees' salaries, $80, credit payrolls $1,053.90, and then it itemizes the weekly payroll. I have no way of knowing whether the payments that were made for work returned by agents appear in these payrolls, except that I would be inclined to think that

they did not contain any, simply because of the check stubs of the Royal Bank of Canada for February and March, which show a number of payments charged to liquidation number so and so, and those agree with the corresponding entries on the agent's records, so that I am assuming that these cash payments, I mean these payments by check, refer to the merchandise returned by the agents.

Amounts paid outside to agents and people in the island for work done and clothing and other articles and returned to the factory, were charged to cost of production, but not through labor, not through the payrolls. As to what were the average weekly amounts disbursed over the counter, as shown by the petty cash, to people who brought in work and delivered it over the counter, we can start in here from March 18th and work backwards. March 18th, cost of production, sales counter, $25.40; on the same day, and same account, $83.26; March 10th, $83.85. As to the weekly amount of these payments, we would have to make an analysis of this. They were not paying weekly, but off and on. March 10th was $83; March 5th, was $89; March 4th, was $81. In the first ten days of March without giving you exact totals, it is $254. I will give you February. $324 in the month of February.

RAFAEL WOLF, a witness previously called on behalf of the plaintiff, was recalled and, answering questions propounded by Mr. Travieso, testified:

The papers contained in the box shown to me, which says on the top "Comprobantes, petty cash", are petty cash vouchers which were delivered to the office of Mr. Hastrup and they cover payments made out of petty cash from May 31, 1931 to September 30, 1931; all of those vouchers were made by Mrs. Rivera Soler and by another employee in the office by the name of Ramon Aguilu; they were turned over to me as bookkeeper, so that I could make the entries in the [fol. 223] book; the entries in the petty cash book were made from those vouchers; these vouchers have been kept by me all the time, but they were sent to the office of Mr. Hastrup; I have kept that all the time, with the exception of the time they were in the insurance company; they were turned back to me and are the same ones that were made in the safe at the time of the fire.

[Answering questions by Mr. Brown, the witness testified:]

I have personal knowledge as to these vouchers; all of them were paid in my presence; for instance, a working woman would come to the office to collect and this voucher would be made in my presence and it would be paid; the voucher would be made in my presence and under my direction by Mr. Rivera Soler and then entered in the books.

[The said vouchers are admitted in evidence and marked "Exhibit No. 41 for Plaintiff".]

WILLIAM A. WAYMOUTH, a witness called on behalf of the defendant, was recalled and, answering questions propounded by Mr. Brown, testified as follows:

I know the nature of the business carried on by Rivera Soler & Company. Retroactive entries are made only on special occasions, which might warrant such an entry. If you had made a mistake and found it out months later, and wished to adjust your preceding entry in the operating account in order to show your correct profits for that year, or if you had accounts that could not be liquidated on the day of the closing of the books, like for instance you have a local house here that does business elsewhere, and your final invoices or your liquidations of shipments or other transactions of that nature do not come back to you until perhaps a month or two or three months after the closing date. Then you might make the preliminary closing and adjust it afterwards; but you would always endeavor to adjust it as of the day on which the accounts in the books were closed for the period. In my opinion as an expert accountant, the books which have been presented by Rivera Soler & Company do not present clearly and plainly a complete record of the business transactions of that concern, including all purchases, sales and shipments for cash and credit.

[fol. 224] [Answering questions propounded by Mr. Travieso, the witness testified further as follows:]

I have been in the exercise of my profession as public accountant for nine years, here in San Juan. During those nine years I have had the opportunity of examining the

books of account of many firms, partnerships, corporations and so forth. In the case of an entry where the voucher appears to have one date and the entry appears to have been made several days or weeks later, and in the absence of any specific, clear evidence of fraud, I would call that an error. That error may possibly have been made without any purpose of defrauding anybody. As to whether I would not consider the mere fact that such an error was made or commit-ed one time, twice, several times, as evidence of an intent to defraud anybody, not necessarily. There are two vouchers that are fastened to the invoices by a new clip instead of an old one. Here they are.

The voucher shown to me refers to machines coming to Rivera Soler & Company from Dolcey & Company, Inc.

As to whether it is the purpose of my testimony to have the jury infer that because this fastener or clip appears brighter and newer that the others that the firm of Dolcey & Company never sold any machinery to Rivera Soler & Company, I didn't say that. As to whether I have been able, from my examination of the books, to determine the origin of the transaction whereby the plaintiff corporation became the owner of the so-called Dolcey machines, I have not seen anything except that record of the amount. In the short time that I have had to examine the books of the plaintiff corporation I have seen a lot. I did not see the history of the acquisition of the Dolcey machines. The only thing about the Dolcey that I saw, that I know, is that there is a voucher. The voucher is the record of the sale of the Dolcey machinery to J. Rivera Soler & Company recorded to the credit of J. Rivera Soler and Dolcey. That's the history of that as it appears on the books originally, and for $1,400, and amended to read twenty four hundred and some dollars.

I have no knowledge of what he (Rivera Soler) paid for them (the Dolcey machines). What I have found on the books is a voucher for twenty-three hundred and some dol-
[fol. 225] lars. I have already testified in reference to that. That is the voucher I showed a minute ago. The distribution of that amount in the books is: $1,400 to the credit of Dolcey and $800 and some odd dollars to the credit of Soler, and this is not what originally appeared on the journal. The journal had an entry only for $1,400 when it was first made. Then it was erased and the increased amount was put in. I cannot pass upon the purpose of it (the aforesaid

entry), I have no way of knowing what arrangements there were between the interested parties; I think the alteration of that entry in the book would affect the amount of the recovery.

When these books were delivered to me I realized that there was absolutely no time to make an analysis of every entry and to make an investigation of every transaction. There was no time for that. I was told, here are the books, see what you can find, see if they are all right. A glance at the general ledger made me suspicious, and from the moment that your suspicions are aroused, you pick out certain items. A glance at the general ledger and going over it casually—I think it was two o'clock in the afternoon in the other room—made me feel that the general ledger was not legitimate and consequently, working from the general ledger, back through all these vouchers, I have examined every voucher and supporting paper to see how everything tied in. Many of the entries that looked normal I could not devote any more time to them than to just pass upon them, and I concentrated especially on the things that were actually sufficient to cause an accountant to wonder what they meant.

I have not had time to make a complete and thorough audit of the books. An audit of these books is not possible now with the missing records. It is impossible to say how long it would take to make an audit of these books because there are different kinds of audits. If you want an audit to prove that every single suit or yard of goods was counted it would be prohibitive to go through; all the examinations are not made in such a thorough and searching manner. You can audit and examine what there is of the books, but there are missing links that prevent you from verifying the entries. You have to obtain them (the missing links) from the source. As to the checks that are missing, the [fol. 226] payments made to certain customers can be verified by verifying the payments to the customers. That can be done.

The Court: When you make an audit and find apparent errors or omissions or entries that need explanation, is it your custom to confer with the person who made the entry to see what his explanation is?

A. It depends.

The Court: Well, you want to get at the truth of the ac-

counts. With your audit you report the explanation, don't you?

A. If it is made in a current way. In other words, if we are auditing for account of the corporation and the executive in charge wants us to audit, we usually consult with the man who did the work.

The Court: If you are examining a bank and find entries that need explanation, would you not call the cashier or president of the bank and ask about it?

A. Yes, I would, unless I were suspicious.

The Court: What difference would that make?

A. If you have any suspicions about a certain amount in an entry, or about a certain man, you are most careful not to discuss anything with him, but rather with his superior.

The Court: You mean if you are suspicious of a man you would not give him a chance to clear up something that is in doubt?

A. We would give a chance to his superior.

The Court: Suppose he is the superior?

A. Then we would have to ask him, if we are doing the work for him.

The Court: Well, suppose you are doing it for the court. Suppose the court sends you out to do a piece of auditing and you are advised that you are expected to get the truth from the accounts and records available and report it back?

Mr. Brown: Your Honor please, your Honor will understand why I make this statement; if these were questions by counsel I should object; the reason is this, that it is well established law that the books under the iron safe clause must speak for themselves and cannot be supplemented and cannot be explained by oral testimony.

The Court: That is quite true, but I was a little bit sur-
[fol. 227] prised at the statement, and I am trying to bring out what his custom is, in making the statement. I am just trying to find out if that is the practice.

The Witness: You consult with the man who entrusts the audit to you. In other words, if you and the court instructs us, or me, to do something and report to you, anything that I find I am bound to discuss and bring to you, but if I am asked to investigate certain books and I am not permitted to be in court to know what the evidence is, I have no knowledge whatsoever of the case as it is going, and and what evidence is being presented. I am debarred com-

pletely from the room, and I am not going to get up and make inquiries which would in any way show what my line of reasoning was.

The Court: If my questions have indicated anything at all except a desire to find out the method, I hope the jury will disabuse thier minds of that; but I understood always that if you find a missing link, you try to find a way to supply it, if you can, and one way is to confer with someone who knows anything about it.

A. Yes, your Honor, but certain books were in evidence, and I had a list of books, exhibits, supplied to me, and from that see if you can furnish the evidence necessary in this case. If there are missing links that could have been produced, and that are not in evidence, I am not to blame. I refer to the evidence submitted to me.

The Court: In other words, you would not consider in this matter that it is incumbent upon you to supply any missing links, or any explanation of entries?

A. None whatsoever.

Mr. Brown: I suppose occasionally Mr. Waymouth has to make examinations of books and records of firms or corporations that do business with banks, not banks themselves. The question I asked you Mr. Waymouth, the very last question, was whether these books and papers that have been offered here by themselves constitute a clear record of the business done by this concern, the plaintiff here, without the aid of extraneous testimony or without the aid of anything outside of what they themselves show, that would give you sufficient information to determine the stock on hand at any one time, the stock used up, the outgoes of cash and the receipts, and the purposes [fol. 228] for which such receipts and outgoes were made, and when I am talking about the stock on hand I also include the stock of goods that was sent by outside parties to Rivera Soler & Company to work?

A. And I answered no.

[Mr. Brown offers in evidence identification No. 1, which is the certified tax return made by Mr. Wolf for the corporation, and the same is admitted and marked "Exhibit No. 13 for Defendant".]

A Juror (referring to the account of Mr. Rivera Soler): If I understood you before, you said that it was not added monthly?

A. Yes.

A Juror: What about this?

A. That is where it stops. It is added up to here, and it stops here, and this is the figure that I reported as having been interlined, $853.68, and here the change in the footing, the change in the footing, the change in the footing, no monthly additions throughout except the totals at the end of the page, the carry forwards.

A Juror: Here are little dots, and it seems to me that it has been added on a separate piece of paper, on the top of the book. Did you make those little dots?

A. I see the dots. To me they don't mean anything.

A Juror: Then you didn't make those dots?

A. No.

[Answering questions propounded by Mr. Brown, the witness further testified:]

That is the box of the petty cash vouchers. I looked at all the petty cash vouchers last night. Those petty cash vouchers are included in envelopes which appear to be applicable to the different days of the entries in the petty cash book. Those vouchers are not in standard form, but that does not mean too much. There are many that are not signed, but they have the appearance of being bona fide even though not properly signed, and although there may be a few which might be personal matters they don't amount to much either; so I am assuming that they are all bona fide and properly recorded; but they are not complete because they only go from May, 1930, I think it is, to February 1932. But even if they were complete, in the [fol. 229] way they are prepared there is no way of knowing the merchandise that came over the counter for which the payment was made.

In other words, there are two types of vouchers, memoranda for general expenses and charges to personal accounts and other expenses, and then little slips of paper representing the payment to the operators outside the plant who took work out, and on which basis they were paid when they delivered the work. There is no mention in any of those vouchers of the amount of work. If you would like to see the vouchers I can show you just exactly what I mean. I will show you one as a sample of what goes on throughout. You can take at random any day. You

see, that says petty cash of the 29th of February, 1932. You see, there are two types; this is what I refer to as the memoranda or little slips of paper, some signed and some not signed, but presumably all normal. Guagua (bus), express, guagua, freight on lumber, express, guagua, postage, stamps, and so on, although they are of the same nature. Now those are vouchers for the expenses and miscellaneous disbursements, and these are the vouchers for the work turned in over the counter.

There is an adding machine take—I mean the work returned by the operators. All the thing says is a name, which presumably is the operator's name. [The witness reads one of these vouchers.] "Maria Torres, 27th," I understand that to be the day of the month, because it is entered more or less about that time, and they are all numbered the same. And then there appears the amount, fifty-five cents and "O.K.", and a little symbol which presumably is the initial of the person authorizing it, so they seem to be bona fide vouchers. But the information is exclusively the payee's name and the amount and O.K., and like that there are hundreds of them in there. Many of them are initialed A. R., which I believe was the authority because it also appears on some of the other petty cash vouchers; and as regards the charges to cost of production in the petty cash, this is all that supports all the entries. There are no units, just values.

There are others here all the same, hundreds of them. These vouchers contain no information as to the amount of merchandise returned in any one case. Here there are no vouchers, or tickets or anything else that show the amount [fol. 230] of merchandise delivered to operators over the counter. Every one of these packages represents a day's entry, and just as the two types the memorandum for miscellaneous disbursements, as I read them out, guagua, stamps, and so on, and the other little ticket with the adding machine tape attached representing the tickets paid over the counter, for work done outside.

X Q. 11. There is one thing that you testified on your direct examination that I didn't understand. I was just asking you about it at the table. You didn't have an opportunity to complete your explanation; I didn't understand this difference of a thousand dollars in some entry that you spoke about, either bad addition or subtraction.

A. Well, I think I remember which you mean.

X Q. 12. As I remember, I think you said it was a thousand dollars out, and my recollection is that it was ——

A. Let me see if I can locate it. Was it in the materiales de elaboracion?

X Q. 13. I don't know. I simply remember that there was a difference of a thousand dollars that you referred to.

A. I will see if that is the one I think it is. Yes, I think that is the one. This is the difference to which I referred. The account of materiales de elaboracion or manufacturing supplies. This is the account that has all the entries of thread. On page 5 of the general ledger, Exhibit No. 1, we find that on page 3 of the inventory book Exhibit No. 4 the inventory of this material on December, 1930, is $500, and on the ledger the same. Therefore, the inventory book and the ledger agreed on December 31st, 1930. Now on December 31, 1931, the inventory book, page 5, states that there are $2,324.74 on hand of manufacturing supplies, yet the ledger figure shows only $800. In other words, if the ledger had been adjusted to agree with the inventory they would have had to make an entry of the difference between the book figure of $800 and the inventory value of $2,324.74. Now that would be $1,524.74. That is the necessary entry to adjust the ledger with the inventory book. But by voucher No. 1266 on February 23, 1932, they charge the account manufacturing supplies on the general ledger and credit the personal account of Mr. Rivera Soler with the explanation that it represents manufacturing supplies the property [fol. 231] of Mr. Rivera Soler personally, which he has supplied up to December 31, 1931, and the value of which is credited to his current account under date of February 28, 1932, for readjustment, and the amount of that entry is $2,524.74., which is exactly one thousand dollars different from the entry necessary to adjust the books figure with the inventory figure.

X Q. 14. A thousand dollars more or a thousand dollars less?

A. More. The inventory says $2,300 and the books says $800. There should have been a write up in this book of $1,500 and the write up is $2,500.

[Answering questions propounded by Mr. Travieso, the witness testified:]

As to whether, if that ledger had been written up to correspond with that inventory the books would have been

in good shape, not necessarily. That is only one of many things. As regards this item, the ledger would have been made to agree with the inventory account, but it would not explain why the credit was made in February, and not in December, for merchandise that had been delivered prior to December. An inventory is made by checking or counting the merchandise machines, supplies and so forth and making a list of them, and giving them a price or value. My testimony shows that in this case they omitted or forgot to make the corresponding entry in the ledger. As to whether that may have been an oversight or an omission, it could be, under certain conditions, but the majority of times it could not be because if you have a company, with the same man who signs the inventory also signs the checks and supervises the business, to me, as an accountant, I don't understand how books could be closed and then a correcting entry made almost two months after the date of closing, when the whole staff and the owners and everybody were right there.

I cannot understand or even attempt to explain that. It is not good accounting practice. I say again, it could happen, and there might be a very good reason for it, but the chances are that if an inventory is taken and everybody is there, it should be and usually is entered immediately on the books and the books are adjusted. Now in the preceding inventory, for 1930, the entries have been made [fol. 232] and the books adjusted in accordance with the inventory, so it has been done in this case a year previous. Now, why it was not done in this case I could not say, but it is not customary or current. The figures of the inventory taken on December 31, 1931 were not used in the closing of the books after December 31, 1931. The books were closed in many instances without reference to the inventory.

I can just give you an example. Machinery is $7.25 in the inventory book, as compared with the ledger value. They threw out $7.25, which was on the ledger, which apparently somebody thought was repairs, and so they didn't have it on the inventory. Furniture and fixtures, they have on the inventory $4,185 and on the ledger $4,488.72. The ledger shows higher than the inventory. Printed matter or stationery, the books show $125, and the inventory shows $87. They were not adjusted one way or the other. In other words, these items which show less than the books

were not adjusted. Manufacturing supplies, the ledger shows $800, the inventory shows $2,324.74. That was adjusted afterwards, in the month of February. The ledger says merely balance, and presumably it is estimated, but the 1931 accounts by voucher 1224 charged to profit and loss the proportion of the purchases which had been considered as having been consumed in the year, leaving a balance of $800. No descriptive detail of the $800 appears. Only the $2,324 appears on the inventory.

Then mercaderias, which is sobrantes or surplus merchandise, on the inventory is shown $5,334.40, but on the general ledger it shows $1,379.25, which also was adjusted afterwards by that entry crediting the increase in surplus merchandise on hand. Materiales,—I should say "Labor and Mercancia", which is labor on merchandise, in process, the inventory shows $4,153.50, whereas the ledger figure shows $800, afterwards adjusted to agree. No, I withdraw that. Not adjusted to agree. Although the books show $800 the inventory shows $4,153.50, the adjusting entry was made for $4,153.50, making the ledger come up to $4,953.50. The $800 was forgotten and both were added together. These inventory figures, some of them, were adjusted onto the books on February 23, 1932, but when they ruled off these books there is no mention made of inventory, [fol. 233] and the one or two items which would have had to require an inventory, like materiales de elabracion (manufacturing supplies), and work in process, they just left an estimated $800 apiece.

If a profit and loss statement or trial balance were taken on December 31, 1931, it would be taken from the ledger. Based on the book values, book amounts it (the trial balance) would tend to show a much lower profit because in practically every case where the inventory appears here it is much higher than what appears on the books. Stationery is an exception. The inventory is $87 and on the books it is a few dollars more, so there is a loss on that, but the major items of materials in process and manufacturing supplies and surplus merchandise, those three on the books are much less than on the inventory book, and therefore the profits are correspondingly lower. I know that these adjustments of the ledger to correspond with the inventory were made on February 23 because it says so on the vouchers and in the ledger itself. The date of

making these entries appears in perfect good faith in the book itself. It is not a discovery that I have made outside of the books themselves. There has been no attempt to make it appear in the ledger or any other book that the entries absolutely made on February 23d had been on the date of the inventory. They are dated February 23d and they are so dated on the vouchers and on the journal and on the ledger.

As to the petty cash vouchers, I went through every one of them. As to whether I found that those vouchers, no matter what they showed, had corresponding entries in the petty cash book, I didn't compare those 100 percent, but I did test them and they appeared to be correct. In other words, I examined all the vouchers and at random I took tests to the entries in the books and they were all right, all the tests that I made. Besides the petty cash vouchers supporting expenditures, disbursements, there are a few slips reflecting the purchases. I mean, a few slips for sales and deductions from payrolls for items damaged. As to whether I stated that the petty cash book, for the first ten days of March, showed sales amounting to 250 odd dollars of surplus merchandise or remnants, and in February that it showed $300, I said that the petty cash vouchers showed that. I think I referred to disbursements for goods over [fol. 234] the counter. Last night I also made an analysis of those miscellaneous sales. I can give you the exact figures. The sales for February were $6.50, credited to cost of production and $49 credited to surplus merchandise, and in March it was $52.34 credited to materials, through petty cash. I made a summary of the sales that appear on the petty cash book. I will give them to you by months; February, 1931, $6.00; March, $1.85; April, none; May, none; June, $3.60; July, $1.70; August, none; September, none; October, $67.; November, $18.30; December, $6.50; January, $22.29. Those all have been credited to production cost, and the other figures I gave you were credited to surplus materials in February and March. Yesterday I stated the amounts of monthly payments made over the counter for work done and returned. I started to tell you about the month of February, but I got out a list last night of all the payments appearing on the petty cash book from February, 1931, to March, 1932. Now that comprises thirteen and a half months, and in that

period they have paid $5,712.63, or an average for those thirteen and a half months of $423.16 per month. That is what those little tickets represent.

The total payroll that appears on the ledger account, the payroll account, which includes the factory labor and the office salaries, amounts to an average for the year 1931 of $1,561.52 per month. So if that is $1,500 per month and this is $400 per month, that is the comparison. It is about twenty-seven percent. You can make an effort to make comparisons, but when you come down to—I will show you what I mean. There would be three accounts there that would have to be taken in conjunction, production which is the income from the outgoing goods, the sales and the work done; cost of production, which by its title you would understand to mean the total cost of manufacturing the goods that went out in production; the payroll account, which is the total of all payrolls, including the office. If you could be sure that every entry in the different years meant the same thing and had been recorded in the same way, you could make an effort and say well, if my cost of production amounts to so much for 1930 and my production amounts to so much in the same year, a certain related percentage of one with the other, then you can [fol. 235] compare 1931, and that would establish its proportionate cost of production either in labor or materials, or what have you.

But you can only compare similar things, and you cannot compare 1930 and 1931 in these books because the same entries have been recorded in different ways for the different years. Those are the entries which we can see. Now, if necessary, we could go through all these vouchers, pull out the entries that have been recorded in different ways in different years, and adjust them. But we would have no way of knowing whether the entries that we cannot see, which come through cash disbursements, we have no way of knowing how those have been entered one year with another. There is an account entitled "Production" which means the income from goods shipped. Against that production they have innumerable credits which represent charges by the New York people for either defective goods or shortages or something of the sort. There is also a payment in cash which cannot be ascertained, and then we have one inventory the cost of production, and one inventory in production those we know of. In other words,

when they took out the corresponding amount of the goods that had not been used in one case they credited it to the cost of the merchandise, which is a deduction from cost, and in another case they credited it to production account, which is an increase in income. Do you see what I mean? It destroys the percentages, although it leaves the profits the same.

As to the total volume of their business, the total manufactured, and the total cost, I can give you the figures that the books show without any responsibility on my part, because I have not examined them. The account of production, which is the main income account, shows a credit to profit and loss on December 31, 1929, presumably,—no, not presumably, but for the ten months, of $39,422.03. Now 1930, the same entry on December 31, 1930, transferred to profit and loss, is $60,173.69. In 1931 the corresponding entry transferred to profit and loss for the year 1931 was $49,869.76. Now if you want to I can just look at the journal a minute and see if there were any other accounts. On December 31, 1931, the closing entry of profit and loss for the year contains as a credit to profit and loss only that item I have just given you for forty-nine thousand and [fol. 236] some odd dollars for production, and miscellaneous income of $40.44, so their gross income was roughly $50,000 total, per the books. I don't guarantee the figures.

The general ledger is in balance, with one peculiarity that I didn't have time to find out about. I stated that the petty cash account, the addition is wrong by $3 and yet the ledger is in balance. The other book that I have that should have been in balance was the current accounts and that was in balance. As to whether this current account balances with the control account in the general ledger, if you will excuse me a minute I will tell you fully. The general ledger, we took trial balances as of December 31, 1930, December 31, 1931, and March 18, 1932, and the general ledger was in balance at each one of those three periods. The only dfference was the $3 item in the petty cash, and the current accounts ledger was in balance on the same dates. The various items that I mention are simply inter-accounts; debits and credits to show the proper condition.

[Mr. Brown offers in evidence identification No. 2, which was the comparative statement of the Handcraft Company presented in connection with Mr. Steffens' examination,

and the same is admitted and marked "Exhibit No. 14 for Defendant"; and also the following documents: identification No. 5, which was the copy of an inventory furnished by Mr. Bojas in connection with his testimony, which document was admitted and marked "Exhibit No. 15 for Defendant"; identification No. 4, letter by Rivera Soler & Company addressed to the Handcraft Import Company under date of March 18, 1932, which document was admitted and marked "Exhibit No. 16 for Defendant"; identification No. 3, which is the supporting memorandum or voucher under which an entry of machinery and furniture was made in the books as of some date in July, 1931, and which was also the basis of a credit entry to Mr. Rivera Soler personally, which document was already admitted and marked "Exhibit No. 40 for Plaintiff."]

[fol. 237] ARISTIDES SIMONPIETRI, a witness called on behalf of the plaintiff in rebuttal, answering questions propounded by Mr. Travieso, testified as follows:

My name is Aristides Simonpietri; I am an insurance agent; I represent an insurance company that had a policy of insurance on a building belonging to Mr. Pumarada and which was destroyed by fire on the 13th of March 1932; I was not at the place of the fire at the time of the fire, I was there after the fire; I think the fire was Saturday night, and I went there some time before noon on Sunday morning; I went there to investigate the fire because I was interested in the insurance on the building; when I got there I saw that the building was practically destroyed, with very little of it left, and I went inside the premises to see what was going on and try to see if I could establish the origin of the fire, and I started to make investigations; I also went over to see the assured, who lived right in front of the building; when I started to make this investigation there was a whole crowd of people there; after I made an investigation of the building I put a watchman there to prevent people from going and getting into the premises; I did that for the protection of the property, to see that nobody got inside to remove the debris, and all that; there was the salvage of the people who occupied the place, and there was zinc, and also several pieces of cloth and machin-

ery belonging to the factory that was operated in the building; like most of these cases, they (the people that I saw at the place of the fire) were coming in and out, several people inside trying to pick up things and take them away; I did see people taking away things; there were boys there picking up from the debris metal wheels and pieces of machinery and taking away pieces of cloth; that led me to employ a watchman and to put him in care of the place to prevent people from entering and taking property away; that was done sometime about noon Sunday; I think it was Sunday; I am not positively sure, but I remember it being a holiday of some nature; I was home when they called me up and told me about the fire.

[Answering questions propounded by Mr. Brown, the witness further testified:]

I got there some time before noon Sunday morning; I [fol. 238] don't remember whether it was ten o'clock or eleven o'clock or twelve o'clock; something like that; I don't remember that the debris was still smoking; I don't believe so; the fire was already out; I think the fire was entirely out; I did not see anybody moving motors, but parts of sewing machines yes; as a matter of fact I saw a boy stealing one, and I made him put it back there in the place again; I saw boys taking away some of those machines [referring to Exhibit No. 7 for defendant, which is a picture of the sewing machines] and I made them put them back again; I don't have any idea how much one of those machines weighs; I suppose they weigh about fifteen or twenty pounds, or ten pounds; I saw boys picking up sewing machines and starting to carry them off and I made them put them back; at the time I arrived there absolutely nobody prevented me from going into the premises; I am positive that prior to my arrival at the premises there was no watchman there, none whatsoever; the property might be liable to robbery from the time the fire ceased to smoke and the time that I arrived there.

JOSE RIVERA SOLER, a witness previously called on behalf of the plaintiff, was called in rebuttal and, answering questions propounded by Mr. Travieso, testified as follows:

Q. 3. Mr. Rivera Soler, in the accounts of Rivera Soler & Company there appears a sum of merchandise consisting of savings or remnants saved by the corporation in the course of its manufacturing operations. I want you to explain to the jury the process that you followed in the cutting of materials for the purpose of effecting the greatest possible amount of savings.

Mr. Brown: I think that is hardly rebuttal, your Honor; that is part of the plaintiff's regular case.

Mr. Travieso: It is rebuttal in this way: Mr. Waymouth has testified showing great surprise that on a certain date in the inventory of 1930 there was a quantity of materials and that in 1931 that quantity increased considerably, giving the impression that the amount has been increased without any justification, for the purpose of this claim. I want the witness to show by the process that he followed, and later by an additional explanation, why there was such a [fol. 239] small quantity in 1930 as compared with the greater quantity in 1931, and I think it is proper rebuttal of the implication coming from the testimony of Mr. Waymouth.

The Court: I will admit the testimony.

Mr. Brown: Will your Honor allow me an exception?

The Court: Yes.

The Witness: The paper that I have in my hands is the first thing that we do when we receive an order; we take the width of the paper of the same size as the cloth, and we mark it on the paper in order to be able to effect all the saving possible in the cutting of the material; it (the aforesaid paper) contains the markings adjusted to the order received from the United States; this is work that is done in order to save as much as possible, and not lose any material at all at one end or the other, or at the sides; this work is more laborious than is customary in the United States, because in the United States they prefer to use more material, if necessary, but to save time, because their time is worth more money than the material; this is very difficult to cut, because it is cut to a height of four or five hundred thicknesses, and in order to work the machine around all

these angles and curves is rather difficult; in the United States the process is to cut it more openly, and allow a wider lane between lines for cutting; those layings or heights of cloth that are shown I have adjusted in the shop; even this border, the edge that you see here, belongs to the cloth.

Mr. Travieso: If your Honor please, I offer this in evidence in support of his testimony.

Mr. Brown: That is objected to as not being proper rebuttal.

The Court: I understood the purpose of this testimony was to reply to certain testimony by the last witness, and also possibly, one other witness, who testified as to the salvage. The effect of his testimony, as I recall it, was that in his factory he had very little saving. Your purpose now is to show, if I understand it—that is the purpose for which I will admit it; otherwise, I don't think so—that by reason of his plan of operation he was able to save more in one year than in a previous year.

[fol. 240] Mr. Travieso: No, the purpose is to show how he accomplished the savings, first, and the question of comparison will come later.

The Court: That is what I understood. I will admit it for that purpose.

Mr. Brown: Please note an exception.

[The document was admitted and marked "Exhibit No. 42 for Plaintiff".]

Q. 4. Mr. Rivera Soler, it appears from the books of your corporation that the savings or remnants from materials for the year 1930 were—I don't remember the exact figure, but in the neighborhood of fifteen hundred dollars; and then it appears by the last inventory, that of 1931, that during the year 1931 the savings were about twice as much as in the previous year.

A. That is due to the fact that there are houses which supply materials already cut. For instance, in the year 1930 if I worked for a house like Dolcey, which I did, I would not have had any remnants left over.

The Witness: The work that I did for Dolcey came already cut; that work was done in 1930; that was the principal house for which I did work in 1930; the greater part of that material for the work done in 1931 was cut by us

in Puerto Rico; we try to bring the cutting to Puerto Rico as much as possible; for instance, in 1928, I had no overage from the cutting; all the material was brought in already cut; latterly, we have been endeavoring to cut our material here, and thus the savings in the remnants are considerably increased; for instance, right now I receive no material whatever from the United States that is already cut; in all lines we do all of our cutting now; the quantity of materials for manufacture that is being cut in Puerto Rico has been increasing from year to year.

[Answering questions propounded by Mr. Brown, the witness further testified:]

I testified that the Handcraft Company sent their merchandise already cut; Madeira in piece goods; that came in whole pieces; the Japanese Garment also sent their material in whole pieces; the Jacobsen material we cut here in Puerto Rico; Greenberg in Puerto Rico also; Greenberg would send a small amount of material here, which was made up already in Europe, and to be embroidered in [fol. 241] Puerto Rico; but the major part of their material was cut by us here; Henry Bloch sent work both cut and uncut.

Luis E. Garcia, a witness called in rebuttal on behalf of the plaintiff, answering questions propounded by Mr. Travieso, testified as follows:

My name is Luis E. Garcia; I am a government employee; I am employed in the insular telegraph bureau; I am acquainted with the firm of Jose Rivera Solar & Company, Inc.; I opened for them a set of books in 1929; if I am shown those books I can remember whether they were the ones that were opened by me. [Being shown the books the witness states:] I worked on this book up to here; that is the journal register, Exhibit No. 3, page 21, up to May, 1930; this is the same book that was opened by me; Exhibit No. 5 for the plaintiff was also opened by me, up to May, 1930; I opened this and kept it myself up to May, 1930; Enrique Jimenez and Mr. Wolf assisted me in the opening and keeping of these books; Exhibit No. 1 for Plaintiff is a general ledger; I did not work on this book; that is the handwriting of Mr. Wolf; I know the handwrit-

ing of Mr. Wolf; those entries contained in that book are in his handwriting; that book was opened as a part of the bookkeeping system that I opened for this corporation.

With respect to this book, Mr. Ruiz Nazario looked me up some days ago and I went to the office of Mr. Waymouth; there they asked me the same question, whether this was the same book that had been opened; of course, as to the other books I can answer one hundred percent, because they contain my handwriting; as to this, I did not write in it myself, but as the journal register is here, and as I worked up to May 30th on that journal register, I advised Mr. Waymouth that all he needed to do was to check that with the journal register; I first saw that book when the work was done in 1929 and 1930; that is when the book was opened; as to whether I saw this book for the first time when the books were opened, it seems to me that that is the book, although it does not contain my handwriting; it looks to me like the book that I saw there; as to whether there is anything in the book to make me think that it is another book, I was noticing in the column of production the posting which is on page 51, which corre- [fol. 242] sponds to page 51 in the book; if everything else is in the same form, coinciding with—

As to whether I know of my own knowledge that Mr. Wolf actually opened a ledger book when he came into the organization, this is the book; I don't know whether it was a ledger book of any kind; when the set of books was opened, he worked on the ledger of Rivera Soler & Company; I would be positive that I saw this book there if it contained my writing; the book was the same in appearance and size as this book.

[Answering questions propounded by Mr. Brown, the witness further testified:]

I am a brother-in-law of Mr. Wolf; I went to see this ledger book, among other books, at the office of Mr. Waymouth; Mr. Ruiz Nazario was there; at that time I said the book looked like it (like the book which was in existence at the time of the opening of the books) to me, but that I was not able to be positive; I am sure that I told him that it looked like that book; I did state to Mr. Waymouth and Mr. Ruiz Nazario the books that I had actually worked on; they all had my handwriting in them; and I told them about the

books that were there at the time that I was working for Rivera Soler & Company; I told them that there was a journal voucher that I worked on, because there are some months there where my handwriting appears; Exhibit No. 5, the current accounts book, has my handwriting also.

I told him that there had been a check register, but they didn't have it there in their office at that time; not all the books of the company for a certain period of months were kept in my handwriting; we did a year or a year and one month's work, or something like that, in three weeks; the journal vouchers were made between Enrique Jimenez and myself, and the journal register was made up between Enrique Jimenez and myself; the accounts current was made up by me alone, personally, and Wolf would put the vouchers in order and the checks and check stubs, and made up the general ledger.

CLEMENTE RUIZ NAZARIO, a witness called on behalf of the defendant in sur-rebuttal, after having been first duly sworn and answering questions propounded by Mr. Brown, testified as follows:

[fol. 243] My name is Clemente Ruiz Narazio; I am a member of the office of J. Henri Brown; I reside at San Juan, Puerto Rico; I did have a conversation with Mr. Luis E. Garcia, the witness who has just testified, at the office of Mr. Waymouth, and I showed him certain books; I went to see Mr. Garcia because somebody had informed us that was the man who had opened the books of Rivera Soler; he went to the office of Mr. Waymouth with me, and we showed him the books; we showed specifically this book (Exhibit No. 1, the ledger) to him, and tried to have him identify it with those books that he had opened, as he stated; after examining it he stated that the handwriting was the handwriting of Mr. Wolf, but that he could not identify this as one of the books in the set that was opened by him at the time; he did not make any statement to the effect that this book, Exhibit No. 1, resembled the ledger or a book that was there at the time he was working for Rivera Soler & Company.

Plaintiff's Documentary Evidence

Exhibits Nos. 1 to 10, both inclusive, of plaintiff.

These exhibits consist of books of account not susceptible of transcription and originals of which will be forwarded to the Circuit Court of Appeals for the First Circuit.

Exhibit 11 for Plaintiff

"No. 13380—United Firemen's Insurance Company of Philadelphia

Incorporated 1860—150 William St., New York—Stock Company—mla—.85 plus .30—$345.00, 8.62, 2.73—$536.35—$30,000.00

This Policy of Insurance Witnesseth, That, in consideration of Jose Rivera Soler & Co., Inc., hereinafter called the Insured, paying to the United Firemen's Insurance Company of Philadelphia, hereinafter called the Company, the sum of—$356.35—the premium for the first period hereinafter mentioned, for insuring against Loss or Damage by Fire or Lightning as hereinafter appears, the Property hereinafter described, in the several sums following, namely:

[fol. 244] "Thirty Thousand Dollars": For the term of one year, distributed as follows:

$15,000.00 On stock of merchandise, unembroidered, embroidered and in the process of being embroidered, or for repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing, and repairing the same, including boxes, samples and packages, the property of the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered all while contained in the two story concrete building with zinc roof, situated at Pumarada St. #4, block #657 of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00 On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments, and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$3,000.00 On furniture, fixtures, including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00 Total.

Boundaries

North: Dwelling house of timber construction with iron roof.

South: Pumarada St.

East: Yard.

West: Yard and dwelling house of timber construction with iron roof.

Privilege to use gas, electric or steam for light, heat and power, kerosene, oil-stoves for heating and cooking; to [fol. 245] cease operations as occasion or necessity may require, to store and/or use gasoline, benzine or naptha in the process of operations, to work at all hours and days and to use such materials necessary for the proper manufacture of the goods hereinafter mentioned.

It is hereby understood and agreed that if the assured is not the sole and unconditional owner of all or any part of the property described above and/or if chattel mortgage exists on said property, it shall not prejudice this insurance.

Privilege to install and use radio receiving apparatus, and/or electric motors of whatever horse-power is hereby extended.

This policy shall not be affected by failure of the assured to comply with any of the warranties endorsed hereon in any portion of the premises over which the assured has no control.

In addition to the privileges contained in the printed conditions of this policy, permission is hereby granted to make any alterations and repairs in the within described premises

and this policy shall in accordance with its terms and conditions also cover all materials and supplies therefor, therein or adjacent, and such alterations.

Loss, if any, payable in San Juan Porto Rico Funds.

This Policy shall be cancelled at any time at the request of the assured; or by the Company by giving 10 days notice of such a cancellation. If this policy shall be cancelled as hereinafter provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company rating the customary short rate; except that when this policy is cancelled by the company by giving notice, it shall retain only the pro-rate premium.

Attached to and forming part of Policy #13,380 of the United Firemen's Ins. Co. of Philadelphia. (There appear the initials M. Y. S.)

The Company hereby agrees with the Insured (but subject to the terms and conditions endorsed or otherwise expressed hereon, which are to be taken as part of this Policy), that if the Property above described, or any part thereof, shall be destroyed or damaged by Fire or Lightning, after payment of the Premium, at any time between the 9th day of February One Thousand Nine Hundred and [fol. 246] thirty-two, and 4 o'clock in the afternoon of the 9th day of February nine thousand nine hundred thirty-three, or of the last day of any subsequent period in respect of which the Insured, or a successor in interest to whom the Insurance is by an endorsement hereon declared to be or is otherwise continued, shall pay to the Company and the Company shall accept the sum required for the renewal of this Policy, the Company will pay the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof provided that the liability of the Company shall in no case exceed in respect of each item the sum expressed to be insured thereon or in the whole the sum of Thirty Thousand Dollars.

In Witness Whereof, the undersigned Agents of the Company have hereunto set their Hands, the 9th of February 1932.

For the United Firemen's Insurance Company of Philadelphia:

M. Y. Saldana, Agent.

Iron Safe Clause:

The following covenant and warranty is hereby made a part of this policy:

1st. The Assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date and upon demand of the Assured the unearned premium from such date shall be returned.

2nd. The Assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy.

3rd. The Assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times, when the building mentioned in this policy is not actually open for business; or failing in this, the Assured [fol. 247] shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void.

Attached to and forming part of Policy No. 13,380 of the United Firemen's Insurance Co.

In favor of Jose Rivera Soler & Co., Inc.

February 9th, 1932.

M. Y. Saldaña & Co., Limited, General Agents, San Juan, P. R.

M. Y. Saldana.

Conditions Referred to in this Policy

Misdescription:

1. If there be any material misdescription of any of the property hereby insured, or of any building or place in

which such property is contained, or any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, the Company shall not be liable upon this policy so far as it relates to property affected by any such misdescription, misrepresentation or omission.

Receipts:

2. No payment in respect of any premium shall be deemed to be payment to the Company unless a printed form of receipt for the same signed by an Official or duly appointed Agent of the Company shall have been given to the Insured.

Insurance with other Companies:

3. The Insured shall give notice to the Company of any insurance or insurances already effected, or which may subsequently be effected, covering any of the property hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this policy by or on behalf of the Company before the occurrence of any loss or damage, all benefit under this policy shall be forfeited.

Fallen buildings:

4. If the whole or any part of any building hereby insured or containing property hereby insured or the whole or any part of any building of which it is part shall fall or become displaced, all insurance by this policy on it or [fol. 248] its contents shall cease unless the Insured shall prove that the fall or displacement was caused by fire.

Risks not covered:

5. The Insurance does not cover

(a) Loss by theft during or after the occurrence of a fire,

(b) Loss or damage to property occasioned by its own fermentation, natural heating or spontaneous combustion (except as may be provided in accordance with Condition 6f), or by its undergoing any heating or drying process,

(c) Loss or damage occasioned by or through or in con-

sequence of (1) The burning of property by order of any public authority, (2) Subterranean fire,

(d) Loss or damage occasioned directly or indirectly, proximately or remotely by or through or in consequence of, or contributed to by,

(1) Earthquake hurricane volcanic eruption or other convulsions of nature,

(2) Invasion, act of foreign enemy, hostilities, warlike operations, riot, civil commotion, rebellion, insurrection, military or usurped power or martial law.

and if any claim is made under this insurance the Insured must prove that the loss or damage arose independently of and was not occasioned directly or indirectly, proximately or remotely, by or through or in consequence of, or was not contributed to by, any of the said events or occurrences, and in default of such proof the Company shall not be liable for any such loss or damage or any part thereof.

Risks not covered unless expressly included:

6. Unless otherwise expressly stated in the policy the insurance does not cover

(a) Goods held in trust or on commission,

(b) Bullion or unset precious stones,

(c) Any curiosity or work of art for an amount exceeding £20,

(d) Manuscripts, plans, drawings, or designs, patterns, models or moulds,

(e) Securities, obligations, or documents of any kind, stamps, coined or paper money, cheques, books of account or other business books,

(f) Coal, against loss or damage occasioned by its own spontaneous combustion,

[fol. 249] (g) Explosives,

(h) Loss or damage occasioned by explosion; but loss or damage by explosion of gas used for illuminating or domestic purposes in a building in which gas is not generated and which does not form part of any gas works, will be deemed to be loss by fire within the meaning of this policy,

(i) Loss or damage occasioned by or through or in consequence of the burning, whether accidental or otherwise,

of forests, bush, prairie, pampas or jungle, and the clearing of lands by fire.

Alterations and removals:

7. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement upon the policy, by or on behalf of the Company,

(a) If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire,

(b) If the building insured or containing the insured property become unoccupied and so remain for a period of more than thirty days,

(c) If property insured be removed to any building or place other than that in which it is herein stated to be insured,

(d) If the interest in the property insured pass from the Insured otherwise than by will or operation of law.

Marine clause:

8. The insurance does not cover any loss or damage to property which at the time of the happening of such loss or damage, is insured by or would, but for the existence of this policy, be insured by any Marine policy or policies except in respect of any excess beyond the amount which would have been payable under the Marine policy or policies had this insurance not been effected.

Cancelment of the insurance:

9. The insurance may be terminated at any time at the request of the Insured, in which case the Company will retain the customary short period rate for the time the policy has been in force. The insurance may also at any time be terminated at the option of the Company, on notice to that effect being given to the Insured, in which case the Company shall be liable to repay on demand a ratable pro-

[fol. 250] portion of the premium for the unexpired term from the date of the cancelment.

Occurrence of a fire:

10. On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company

(a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind,

(b) Particulars of all other insurances, if any.

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

No claim under this policy shall be payable unless the terms of this condition have been complied with.

Rights of Company re salvage:

11. On the happening of any loss or damage to any of the property insured by this policy, the company may:

(a) Enter and take and keep possession of the building or premises where the loss or damage has happened.

(b) Take possession of or require to be delivered to it any property of the Insured in the building or on the premises at the time of the loss or damage.

(c) Keep possession of any of such property and examine, sort, arrange, remove, or otherwise deal with the same.

(d) Sell any such property or dispose of the same for account of whom it may concern.

[fol. 251] Abandonment of property to the Company:

The powers conferred by this Condition shall be exercisable by the Company at any time until notice in writing is given by the Insured that he makes no claim under the policy, or, if any claim is made, until such claim is finally determined or withdrawn, and the Company shall not, by any act done in the exercise or purported exercise of its powers hereunder, incur any liability to the Insured, or diminish its right to rely upon any of the Conditions of this policy in answer to any claim.

If the Insured or any person on his behalf shall not comply with the requirements of the Company or shall hinder or obstruct the Company in the exercise of its powers hereunder, all benefit under this policy shall be forfeited.

The Insured shall not in any case be entitled to abandon any property to the Company whether taken possession of by the Company or not.

Forfeiture:

12. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.

Reinstatement:

13. The Company may at its option reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or may join with any other Company or Insurers in so doing, but the Company shall not be bound to reinstate exactly or

completely, but only as circumstances permit and in reasonably sufficient manner, and in no case shall the Company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, nor more than the sum insured by the Company thereon.

If the Company so elect to reinstate or replace any property the Insured shall, at his own expense, furnish the Company with such plans, specifications, measurements, quantities, and such other particulars as the Company may require, and no acts done, or caused to be done by the Com- [fol. 252] pany with a view to reinstatement or replacement shall be deemed an election by the Company to reinstate or replace.

If in any case the Company shall be unable to reinstate or repair the property hereby insured, because of any Municipal or other regulations in force affecting the alignment of streets, or the construction of buildings, or otherwise, the Company shall, in every such case, only be liable to pay such sum as would be requisite to reinstate or repair such property if the same could lawfully be reinstated to its former condition.

Subrogation of rights:

14. The Insured shall, at the expense of the Company, do, and concur in doing, and permit to be done, all such acts and things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated, upon its paying for or making good any loss or damage under this policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the Company.

Contribution clause:

15. If at the time of any loss or damage happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the Insured or by any other person or persons, covering the same property, this Company shall not be liable to pay or contribute more than its ratable proportion of such loss or damage.

Average:

16. If the property hereby insured shall, at the breaking out of any fire, be collectively of greater value than the sum insured thereon, then the Insured shall be considered as being his own insurer for the difference, and shall bear a ratable proportion of the loss accordingly. Every item, if more than one, of the policy shall be separately subject to this Condition.

Arbitration:

17. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an Arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single Arbitrator, to the decision of two disinterested persons as Arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall re- [fol. 253] fuse or fail to appoint an Arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole Arbitrator; and in case of disagreement between the Arbitrators, the difference shall be referred to the decision of an Umpire who shall have been appointed by them in writing before entering on the reference, and who shall sit with the Arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the Arbitrator, Arbitrators or Umpire respectively; and in the event of the death of an Arbitrator or Umpire, another shall in each case be appointed in his stead by the party or Arbitrators (as the case may be) by whom the Arbitrator or Umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the Arbitrator, Arbitrators or Umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such Arbitrator, Arbitrators or Umpire of the amount of the loss or damage if disputed shall be first obtained.

Time limit for Company's liability:

18. In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

Notices:

19. Every notice and other communication to the Company required by these Conditions must be written or printed.

EXHIBIT 12 FOR PLAINTIFF

Exhibit 12 for Plaintiff consists of nine ledger sheets of the current account of Jose Rivera Soler & Co., Inc., with The Royal Bank of Canada not susceptible of transcription, and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBITS 13a, 13b, 13c, 13d, 13e AND 13f FOR PLAINTIFF

These exhibits consist of six box files of vouchers not susceptible of transcription and the originals of which must be examined in accordance with defendant's evidence. The original boxes and vouchers will be forwarded to the Circuit Court of Appeals.

[fol. 254] EXHIBIT 14 FOR PLAINTIFF

This exhibit consists of twenty-four sheets of stock accounts of J. Rivera Soler & Co., Inc., with the Handcraft Import Company not susceptible of transcription and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBIT 15 FOR PLAINTIFF

This exhibit consists of a book of account not susceptible of transcription and the original of which will be forwarded to the Circuit Court of Appeals.

EXHIBIT 16 FOR PLAINTIFF (Translation)

Claim for Indemnity

Caused by fire and submitted under oath to the Insurance Company known as United Firemen's Insurance Co., domiciled in Philadelphia, Penn.

Place of fire:

We, José Rivera Soler & Co., Inc., residents of San Juan, Puerto Rico, as the insured under Policy Number 13,380 of your Company, hereby claim the corresponding indemnity for the damages and losses suffered by reason of the fire which occurred at Santurce on the 13th day of March, 1932, at about 1 o'clock A. M., and we solemnly and in good faith declare the following:

Cause of Fire:

First. That it is our belief that the fire was originated by causes unknown to us.

Estimate of Loss:

Second. That the objects specified in the statement on the back of this document, the insurance of which was effected by virtue of the said policy, were damaged or destroyed to the extent therein stated, and that the cash value thereof is as expressed in said statement, taking in consideration their value at the time of the fire, without including any profit.

[fol. 255] Specify Whether Owner, Creditor, Etc.

Third. That at the time of the fire we were the owners of the said objects, and that no other person had any interest in them, without any exception.

Increase of Risk

Fourth. That at the time when the fire started the building which contained the insured objects was in the same condition described in the policy, and there were neither matters, nor industry nor circumstances of any kind which increased the risk assumed by the Insurance Company, without exception.

Fifth. That the following is a true and complete statement of all the insurance against fire, on said objects, existing at the time of the said fire, to wit:

Company:	Sum Insured:	Policy No.	Expiration
United Firemen's Insurance Co. of Philadelphia.	$30,000.00	13,380	February 9, 1933

Sixth. That the following is a true and complete statement of all the objects existing upon the premises destroyed by fire, at the time of the fire; that no object has been included which was not our exclusive property or which was not there at the time; and that we have not failed to mention therein objects that were salvaged and deposited at other places, to wit:

Statement of the Claim Under Policy No. 13,380 United Firemen's Insurance Company

First Item:

Printing and Office supplies	$141.35	
Raw Materials for Production	9,440.64	
Manufactured and unmanufactured goods	4,838.72	
Labor on goods in process	2,524.50	
Drawn and perforated patterns	400.00	
Total on the day of the fire	$17,345.21	
Value of the salvage "total Loss"	0.00	
Total of the loss	$17,345.21	
Amount insured under this item of the Policy No. 13380	$15,000.00	
Amount claimed under this item		$15,000.00

[Vol. 256]

Second Item:

Machinery and accessories to wit:

56	machines, Singer 95-10 at $71.60	4,009.60
2	id id 95-12 at 56.50	113.00
28	id id 96-10 at 51.50	1,442.00
3	id for buttonholes at 328.00	984.00
8	id Singer 95-1 at 49.80	398.40
2	id id 96-3 at 49.80	99.60
1	id for perforating, with bench	40.00
1	id for covering buttons and acc	143.50
1	id for pleating, with bench	500.00
1	id for piping	61.00
1	id for piping	67.50
4	id Wilcox sewing at 150.00	600.00
1	id for perforating	20.00

Machinery and accessories to wit:—Continued

1	id for picot and motor	48.00
2	id 112W115 with two needles, $205	410.00
1	id 52W12 for sewing shirts	202.00
1	id for cutting U.S.	175.00
2	id for cutting Eastman at $250	500.00
1	id for shirring laces	75.00
1	id 81-5 for sewing with 3 threads	160.00
1	id 22W100 double hemming	172.00
1	id for sewing buttons	205.00
1	id 68-7 for sewing buttons	190.00
1	id 51-10 for tight sewing	140.00
1	attachment for piping S. W.	75.00
1	Motor G. E. 2 HP	120.00
4	Motors High Current 3/4 HP	100.00
3	id id id 1/4 HP	33.00
1	id id id 3 HP	120.00
2	id id id 2 HP	300.00
86	Spaces for benches at $19.50	1,677.00

[fol. 257]

86	Thread carriers at 2.50	212.50
85	Transmissions at 7.00	595.00
63	Ball bearings at 5.00	315.00
3	Individual stands at 17.00	51.00
240	feet of steel shaft at .40	96.00
87	feet of belting of 3" at .50	43.50
1	Lot of acc. for machines	233.50
35	Electric irons at 3.00	105.00
	Total on the day of the fire	$14,835.10
	Value of the salvage "total loss"	0.00
	Amount insured under this item of the Policy No. 13380 $12,000.00	
	Amount claimed under this item	$12,000.00

Third Item:

Furniture, Tools, Implements, Reparations, etc., to wit:

12	forms (dummies) at $5.00	$60.00
4	Large scissors at 3.50	14.00
6	Rulers at 1.25	7.50
3	doz. Eastman knives at 3.00	9.00
3	doz. Delbon Knives at 4.58	13.75
8	Tables for stamping at 10.00	80.00
35	Ironing tables at 3.50	122.50
1	Ironing stand	25.00
3	cutting tables at 137.50	412.50
24	Wardrobes at 12.00	288.00
24	Packing tables at 10.00	240.00
18	Shelves at 15.00	270.00
6	Stands for holding machines at 15.00	90.00

Furniture, Tools, Implements, Reparations, etc., to wit: —Continued

2 Warehouse wheel carriers...at 5.00..	10.00	
5 Mechanical fans with installation.....at 70.00..	350.00	
1 International electric installation.....	100.00	

[fol. 258]

1 Additional electric installation.....	125.00	
1 Counter and fence for merchandise....	125.00	
1 Counter and fence for the office.....	125.00	
220 Folding chairs.....at 1.25..	275.00	
6 Long Tables.....at 15.00..	90.00	
2 Filters.....at 5.00..	10.00	
1 Wall clock in the upper floor.....	15.00	
1 Wall clock in the ground floor.....	25.00	
2 Ordinary benches.....at 2.00..	4.00	
2 Sliding top desks.....at 75.00..	150.00	
1 Table desk.....	75.00	
1 Table desk double size.....	100.00	
1 Small desk.....	15.00	
1 Royal Typewriter machine.....	125.00	
2 typewriting tables, at 7.50.....	15.00	
1 Filing cabinet—wooden.....	35.00	
1 Filing cabinet—wooden.....	15.00	
3 Metal Index Cards Cabinets at 7.50...	22.50	
1 check protector machine.....	30.00	
1 Burroughs adding machine.....	160.00	
3 Desk chairs.....at 12.50..	37.50	
1 Letter heads cabinet.....	3.75	
1 Paper filing cabinet.....	10.00	
1 Storehouse for keeping silks.....	65.70	
Value of furniture, tools, Implements, etc. on March 13, 1932.....	$3,745.75	
Value of the salvage (none, total loss)..	0.00	
Amount insured under this item of the Policy 13380—$3,000.00		
Amount claimed under this item of the Policy No. 13380.....		$3,000.00
Total amount claimed under policy 13380 from the United Firemen's Insurance Company.....		$30,000.00

[fol. 259] San Juan, Puerto Rico, March 1932.

Jose Rivera Soler & Co. Inc., by Jose Rivera Soler, President.

EXHIBIT No. 17 FOR PLAINTIFF (Translation)

Declaration

of the insured Messrs. Jose Rivera Soler & Co. Inc., relative to the fire taking place in his property situated in the town of Santurce, Pumarada Street, on March 13, 1932.

Information and documents that should be submitted and considered as integral part of the claim to be presented upon the occurrence of a fire affecting the property insured.

1. Name of the Companies with which you had the property insured, policy numbers and amount.

Company	Policy No.	Amount	Due Date
United Firemen's Insurance Co. of Philadelphia.	3,380	$30,000.00	February 9, 1933

2. Please submit the following documents:

(a) A certificate of the District Attorney stating the result of his investigation regarding the causes of this fire.

(b) The deed of partnership.

(c) A detailed statement of the Merchandise, Furniture and Fixtures and General Expenses accounts, comprising the twelve months previous to the date of the fire.

(d) Return duly filled the claims spaces herein contained, in duplicate, one for each company, subscribed and sworn before a Notary.

(e) Originals or certified copies of invoices for purchases made during the twelve months previous to the fire.

(f) Originals or certified copies of invoices for sales made during this same period.

(g) Certified copy of the last Balance Sheet.

(h) Certified copy of your Income Tax Return, relative to the property destroyed.

[fol. 260] (i) Certified copy of your last return to the Office of the Collector, for taxation purposes on the property destroyed.

(j) Certified copy of your current account with your Bank or Banks. (signed by said Banks.)

(k) If the policy covers the building, please submit a certificate signed by a civil engineer or other qualified person stating its value before and after the fire, as well as the date on which it was erected.

(l) A report of the goods found inside the iron safe, if there was any.

3. State what accounting system you used, and give a list of the books you kept as part of said system. Voucher system. Vouchers, voucher register, General Ledger, Current Accounts, Ledger, Checks.

4. Did you have an iron safe? Yes.

5. Where did you keep your accounting books during the night? In the safe.

6. State what accounting books were destroyed by the fire. None.

7. How often were entries made in the books of account? As frequently as it was required.

8. State the name and address of your bookkeeper. Rafael Wolf, Ciudad Nueva.

9. When did you start business, and with what capital? May 6, 1929, with $10,000.00.

10. What were your monthly sales? Different amounts which may be obtained from the books.

11. How much do you owe? $12,107.16.

12. State the names of your creditors and the amount owed to each one. Different ones, as they appear in the books.

13. With what commercial houses did you carry on more [fol. 261] business, or from whom did you make your principal purchases? Various American and local firms, as shown by the books.

14. When did you make your last purchase, from whom and what did it amount to? On February 27, 1932. Pedro M. Nieva, Mayaguez.

15. Was your business wholesale or retail? Manufacturing.

16. How much is owed you? $1,269.99.

17. State the name of your debtors, and the amount each one owes you. Various, as they appear in the books.

18. To whom did you sell most? To various American firms.

19. Have you received any letter or drafts from some creditor, demanding payment of his account? If so, state name and amount. No.

20. State name and address of your employees. Jose Rivera Soler, Manager, Guaynabo. J. N. Berrios Berdecia, Asst. Mngr. R. Wolf, Accountant, Ciudad Neuva. Ana T. Rivera, Directress, Guaynabo.

21. Which of them slept in the building destroyed? None. Two slept in the basement.

22. Which were your ordinary expenses, like rent of storehouse, salaries of employees, etc. etc.? Various, as shown by the books.

23. How often did you take an inventory? Once a year.

[fol. 262] 24. What was your Net Income in this business during the last three years? Year before last: This is a corporation and Last Year: This year: the profits are shown by the books.

25. What other premises did you keep to store your stock besides the one destroyed? No other one.

26. What was the depth, frontage and height of the destroyed premises, in meters? (we refer to the space occupied by your establishment). About 25 meters of frontage by 19 of depth.

27. State the amount of the principal articles used in your business, which you had at the time. Merchandise, $17,345.21; Machinery, 14,835.10; Furniture, 3,745.70.

28. On what day and hour did the fire occur and where did it start? March 13, 1932, about 1:00 A. M. We ignore where it started.

29. Where were you when received notice of the same? The one signing this declaration was in Guaynabo, at his residence.

30. What did you do to protect the property? When we arrived at the place, there was nothing to be protected; everything was destroyed.

31. What other business are you engaged in? The corporation has no other business but manufacturing.

32. Did any company cancel you any insurance policy at any time? No.

33. Do you expect to engage in this same business again? Yes.

34. Has there been a false fire alarm before, in this property? No.

[fol. 263] 35. What other property do you own? (Give in detail value and date of acquisition). In none.

36. In what goods of importance have you lost money due to market fluctuations. In none.

37. Do you have a personal enemy in that town? No.

38. Was there gasoline, alcohol, powder, dynamite or any other explosive in the building you occupied? If so, specify the amount. Gasoline, about one gallon. Kerosene, about three gallons.

39. Was there any motor or machinery installed in the building? Yes.

40. How much of your stock do you think you have lost by robbery, due to the fire? Nothing.

41. If the insurance covers buildings, state if the same was unoccupied at the time the fire occurred and since when. XX.

I, Jose N. Berrios Berdecia, as Treasurer of Jose Rivera Soler & Co. Inc., under oath declare that my name is as stated, I am of legal age, merchant and residing at Guaynabo; that the foregoing statement is all true and nothing but the truth, and in testimony thereof I swear and subscribe these presents, at San Juan, P. R. on April 5, 1932.

J. N. B. Berdecia, Treasurer Jose Rivera Soler & Co. Inc.

Sworn to and subscribed before me, by Mr. Jose N. Berrios Berdecia, as Treasurer of Jose River Soler & Co. Inc., of full age, and a resident of this City, to me personally known. Ldo. C. del Toro [fol. 264] Fernandez. San Juan, P. R. April 5, 1932. (Notarial Seal.)

EXHIBIT No. 18 FOR PLAINTIFF

Guaynabo, April 5, 1932.

Mr. F. A. C. Hastrup Adjuster, United Firemen's Ins. Co., San Juan, P. R.

Re Fire of March 13, 1932, Pol. No. 13,380

DEAR SIR:

In reply to your letter of March 26 last, I take pleasure of delivering in your hands the following documents:

1. Duplicate Blank Declaration, duly filled.
2. Certificate of the District Attorney.
3. Copy of Articles of Incorporation.
4. Itemized statement of the merchandise, Furniture and machinery accounts.
5. Copies of invoices.
6. Copy of Inventory of February 29, 1932.
7. Statement of what was found in safe.

Yours etc., J. N. Berrios Berdecia, Treasurer of J. Rivera Soler & Co. Inc.

EXHIBIT No. 19 FOR PLAINTIFF (Translation)

San Juan, April 7, 1932.

Mr. N. Berrios Berdecia, Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

In accordance with our conversation of the 5th instant at this office, in your capacity as representative of the Corporation J. Rivera Soler & Co. Inc. of Santurce, Puerto Rico, I proceed to enumerate the documents that have not been delivered to this office and which must be submitted to this office to check the loss sustained by said corporation by reason of the said fire, to wit:

1. Originals or certified copies of the invoices of purchases made during the last twelve months before the fire.

[fol. 265] 2. Originals or certified copies of invoices of sales made for the same period.

3. Certified copy of the last balance sheet.

4. Certified copy of the last inventory.

5. Certified copy of inventory immediately preceding the last.

6. Certified copy of the last returns for income tax and property tax submitted by you to the government.

7. Certified copy of your accounts with the bank or banks with which you did business, as well as a statement of your petty-cash account.

We also need all the books of account enumerated in your statement in our hands, all of which we expect you to submit at your earliest convenience in accordance with and based on the adjustment agreement signed by us.

Yours, etc., F. A. C. Hastrup, by Arthur R. Davila.

EXHIBIT No. 20 FOR PLAINTIFF (Translation)

Guaynabo, P. R. April 8 1932.

Mr. F. A. C. Hastrup, Adjuster, San Juan, P. R.

Re Fire of March 13, 1932

DEAR SIR:

I am pleased to acknowledge receipt of your letter of the seventh instant.

With this letter I am delivering to you the following books of account, belonging to the firm Jose Rivera Soler & Co., Inc.:

Received J. R. Soler July 20/32.

1. One Ledger. (1)
2. One Book of Accounts Current. (1)
3. One Inventory Book. (1)
4. One Voucher Register. (1)
5. Five voucher files containing those numbered from 722 to 1,314, both inclusive, from January 1, 1931 to March 18, 1932.

Regarding the other documents requested by you, the same may be obtained from the above books.

1. The invoices have been furnished to you and all of [fol. 266] them may be seen in the original vouchers, which I am handing to you herewith. If any one should be missing you may notify me and I will get for you a certified copy.

2. The sale invoices have been for labor and we can give you our files.

3. Copy of the last balance sheet was delivered to you with the other documents.

4. The inventories appear in the inventory book which I am delivering to you herewith.

6. The last income tax return has not been made yet, and we do not know the whereabouts of the previous one.

7. This Company did not keep a Cash Book, it carried only its bank accounts, and the check stubs were destroyed by fire. Certified copy of the account may be obtained from Royal Bank of Canada.

Yours, etc., Jose N. Berrios Berdecia, Treasurer of J. Rivera Soler & Co., Inc.

Note: The sale invoices appear attached to the vouchers.
Jose Berrios Berdecia.

EXHIBIT No. 21 FOR PLAINTIFF (Translation)

San Juan, April 9, 1932.

Mr. Jose N. Berrios Berdecia, Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

Revising the inventory of the effects found in the safe of the corporation, copy of which is in our hands, we request that you be good enough to deliver to us the following books and documents which appear detailed in said inventory, in order that we may continue with the examination of the books and the records of accounts:

1. Two books of copies of invoices of merchandise shipped.

2. One share certificate book.

3. One stockholder register book.
4. Stubs of check book in use.
5. Stubs of draft book in use.
[fol. 267] 6. Two packages of petty cash vouchers.
7. Correspondence relative to the debt of Jacobson.
8. Book of accounts current of Handcraft Import Co.
9. Agents accounts book.
10. A folder with invoices from the United States.
11. We also need the Minute Book of the Corporation.

All of which we hope you will deliver to us at your earliest convenience, in accordance with the Adjustment agreement signed by us.

We remain, yours, etc., F. A. C. Hastrup, by Arthur R. Davila.

EXHIBIT NO. 22 FOR PLAINTIFF (Translation)

Guaynabo, April 12, 1932.

Mr. A. F. C. Hastrup, Adjuster, San Juan, P. R.

Re Fire of March 13, 1932

DEAR SIR:

In reply to your letter of the 9th instant, I have the pleasure of sending you under separate cover the following documents requested by you in your said letter:

1. Two books of copies of invoices of merchandise shipped.
2. One share certificate book.
3. One stockholder register book.
4. Stubs of check book in use.
5. Stubs of draft book in use.
6. Two packages of petty cash vouchers.
7. Correspondence relative to the debt of Jacobson.
8. Book of accounts current of Handcraft Import Co.
9. Agents accounts book.
10. A folder with invoices from the United States.
11. The Minute Book of the Corporation.
12. Certified copy of the Account Current with the Royal Bank of Canada.

Among these books there are some which are needed for the receipt of merchandise from the Island. These books are the Book of Account Current of Handcraft Import Co. [fol. 268] and the Book of Agents, and I request that you let me know as soon as possible so that we may bring it back here.

Yours, etc., J. N. Berrios Berdecia, Secretary J. Rivera Soler & Co.

Received: Items marked 1, 5, 7, 8, 10 and 12. A. R. Davila.

July 21, 1932.

EXHIBIT No. 23 FOR PLAINTIFF (Translation)

San Juan, May 27, 1932.

Mr. Jose N. Berrios Berdecia, Representing J. Rivera Soler & Co. Inc., Guaynabo, P. R.

DEAR SIR:

As we stated to you several days ago, we have received copy of a letter addressed to the United Firemen's Insurance Company by attorneys Richards & Affeld, of New York, with reference to the two attachments, notices of which were served on the Insurance Company some time ago.

We beg to call your attention to the last two paragraphs of the enclosed copy, the contents of which will surely interest you.

At the same time we hereby request you to give us a letter addressed by you to the Porto Rican Express Company, to the New York & Porto Rico Steamship Company, to the Bull Insular Line, to the Red "D" Line, to Banco Comercial de Puerto Rico and to The Royal Bank of Canada, by which you should authorize all of said companies to furnish to us any information that we request from them, with reference to the dealings between them and your corporation, as I am of the opinion that a personal visit of the undersigned to said companies might save several weeks of time which might be lost if we should ask you to furnish us with a number of certificates which we must send to the Insurance Company in accordance with its instructions.

Thanking you in advance, we remain, yours, etc.,

F. A. C. Hastrup.

[fol. 269] EXHIBIT NO. 24 FOR PLAINTIFF (Translation)

Guaynabo, June 1, 1932.

Mr. F. A. C. Hastrup, Adjuster, United Firemen's Insurance Co., San Juan, P. R.

DEAR SIR:

I take pleasure in answering your letter of the 27th of last May, the particulars of which I have carefully noted, as well as those of the copy of the letter addressed to the United Firemen's Insurance Co. by attorneys Richards & Affeld, of New York.

Regarding the letters which you have requested for some of the companies that have had business relations with us, I take pleasure in sending to you herewith letters for the Porto Rican Express Company, New York & Porto Rico Steamship Company, Bull Insular Line and Red "D" Line, for the present.

Regarding the letters for Banco Comercial and Royal Bank of Canada, I will be pleased to send them to you just as soon as I have an opportunity of consulting with my partner Mr. Rivera Soler, who desires to study the matter, because it might possibly affect his business with said institutions. As far as I am concerned I have no objection, but I want to give him the opportunity that he wants.

In the meantime you may start your work with the enclosed letters.

Jose N. Berrios Berdecia, Treasurer, J. Rivera Soler & Co., Inc.

EXHIBIT NO. 25 FOR PLAINTIFF (Translation)

San Juan, Ju[illegible] 9, 1932.

Mr. J. N. Berrios Berdecia, Representing J. Rivera Soler & Co., Inc., Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

We hereby request that you furnish us at your earliest possible convenience, all the payrolls reported by your corporation to the government for the purposes of workmen's

insurance, during the years 1930 and 1931, all in accordance with our adjustment agreement signed by you.

I desire to call your attention to the importance of these [fol. 270] documents in the cases of industrial concerns, as in the present case, said documents being specially necessary in this case in which the absence of vouchers of cash disbursements prevent the exact determination of the movement of the corporation's funds.

We remain, yours, etc.,

F. A. C. Hastrup, by Arthur R. Davila.

EXHIBIT No. 26 FOR PLAINTIFF (Translation)

Guaynabo, P. R., June 11, 1932.

Mr. F. A. C. Hastrup, Adjuster, United Firemen's Insurance Co., San Juan, P. R.

DEAR SIR:

We acknowledge receipt of your letter of the 9th instant by which you *are* asked us to give you the pay-roll reported to the Government by this corporation for the purposes of the workmen's compensation insurance, and inasmuch as our insurer was not the Government but the firm of Carrion, we take pleasure in sending to you herewith a letter addressed to the said firm authorizing them to give you all the information that you may require in reference to the said matter, as we have no copies to enable us to do it directly.

Trusting that this will be satisfactory to you, we remain.

Yours, etc., Jose Rivera Soler & Co., Inc., J. N. B. Berdecia, Treasurer.

EXHIBIT No. 27 FOR PLAINTIFF (Translation)

San Juan, P. R., June 13, 1932.

Mr. Jose N. Berrios Berdecia, Treasurer, Jose Rivera Soler & Co., Inc., Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

For the purpose of supplying our principals in the North information requested by them, regarding the distribution

of the machinery, equipment of the shop and furniture claimed by you, we would appreciate it very much if you [fol. 271] should furnish us with the following data, at your earliest possible convenience and naturally, in accordance with the adjustment agreement signed between us:

1. Location and dimensions of:
(a) Cutting tables.
(b) Packing tables.
(c) Wardrobes.
(d) Long tables.
(e) Stamping tables.
(f) Paper cabinets and storehouse for silks.
(g) Counter and railing for the office.
(h) Counter and railing for merchandise.
(i) Electric fans.

2. In how many sections were distributed the 86 spaces claimed.

3. How many motors were there for operating the 86 machines installed in the spaces above referred to.

4. On what floor were the said machines installed.

5. Where were the rest of machines claimed installed.

6. How were the said machines moved.

7. Where were the desks situated.

We hope that you will give us the said information as soon as possible, in order that we may communicate with our principals, and we beg to remain

Yours, etc., F. A. C. Hastrup, by Arthur R. Davila.

EXHIBIT No. 28 FOR PLAINTIFF (Translation)

Guaynabo, P. R., June 15, 1932.

Mr. F. A. C. Hastrup, Adjuster, United Firemen's Ins. Co., San Juan, P. R.

Re Fire of March 13, 1932

DEAR SIR:

We take pleasure in replying to your favor of the 13th instant, to give you the information therein requested, to wit:

1. Location and dimensions of:

(a) Cutting tables: they were located on the first floor of the building and the approximate dimensions were seventy-two feet long by sixty inches wide.

[fol. 272] (b) Packing tables: they were distributed between the ground floor and the upper floor; their approximate dimensions were 14 feet long by 30 inches wide and some of them were twelve feet by 38 inches.

(c) Wardrobes: They were distributed between the ground floor and the upper floor of the building and their dimensions were about 5 feet high by 4 feet wide.

(d) Long tables: They were 24 feet by 36 inches and they were distributed, three in the basement, two on the first floor and one in the upper floor.

(e) Stamping tables: They were distributed between the two principal floors.

(f) Paper Cabinets: They were placed at the office and they measured about 5 feet high by 3 feet wide. Storehouse for Silks: It was situated on the first floor and it measured about 12 feet wide by 14 feet long and 10 feet high, with shelves on the inside for the storage of merchandise.

(g) Counter and railing for the office: It divided the office from the rest of the other dependencies and it was situated on the first floor, at the entrance.

(h) Counter and railing for merchandise: It was situated also at the entrance, on the first floor and it occupied two doors.

(e) Electric fans: These were mechanical fans made in San Juan and were situated on the second floor over the machine section to provide ventilation for the operators and they were moved by pulleys connected to the belt of the motors.

2. The spaces for the machinery was divided in three sections: two of 36 machines each and one with 14 machines, all situated on the upper floor.

3. The 86 machines were moved by three motors.

4. The said machines were installed on the second floor.

5. The rest of the machines claimed were installed on the same upper floor, and some of them were not installed, because they were kept for replacement, and they were also on the said upper floor.

6. The other machines which were installed upstairs were moved by individual motors.

[fol. 273] 7. The desks were situated as follows: two at the office (1st floor) one inside of the railing of the counter, one at the back of the first floor and one on the upper floor.

Hoping that this will satisfy you, we beg to remain
Yours, etc., J. N. B. Berdecia, Treasurer Jose Rivera Soler & Co., Inc.

EXHIBIT No. 29 FOR PLAINTIFF (Translation)

San Juan, P. R., June 20, 1932.

Mr. J. N. Berrios Berdecia, Treasurer, J. Rivera Soler & Co. Inc., Guaynabo, P. R.

DEAR SIR:

Referring to your favor of the 15th instant, and for the purpose of furnishing to the Insurance Company the information usually required in these cases, we request that you furnish us, in addition to the information given in your said letter, the following data:

1. How many packing tables were there installed on the ground floor and how many on the second floor of the building.
2. How were the wardrobes distributed and what was their depth.
3. How were the stamping tables distributed and what were their dimensions.
4. Where were the wooden filing cabinets installed and what were their dimensions.
5. Same information regarding desks and cabinet for paper.
6. How many machines were there for replacement and how many were there installed with individual motors.
7. What was the area of space occupied by the counter and office railing and space for storage of merchandise, and also the width of the counter and the height of the respective railings.
8. Dimensions and location of individual shelves.
9. Same about shelves.
10. Same as to the machine counter stands.

11. Location of ironing department and space covered by it.

12. What was the location of the remaining eight high tension motors claimed.

[fol. 274] 13. Where was the lot of accessories valued by you at $233.50.

14. How many folding chairs were there installed on the upper floor and how many on the ground floor, and what material were they made of.

15. Whether the 86 bench spaces (bancadas) claimed by you as being installed on the second floor of the building and distributed in two sections of 36 spaces each and one section of 14 spaces were of double faced.

16. And lastly, we need a drawing showing the location of all of said objects at each floor of the building, and also the location of the merchandise recently bought and of the merchandise in process of manufacture or ready for shipment, all of which we will check up in due time, in accordance with the terms of the adjustment agreement signed by us.

Yours, etc., F. A. C. Hastrup, by J. N. Canals.

EXHIBIT No. 30 FOR PLAINTIFF (Translation)

July 6, 1932.

Mr. F. A. C. Hastrup, Loss Adjuster, United Firemen's Ins. Co., San Juan, P. R.

Re Fire of March 13, 1932

DEAR SIR:

We take pleasure in replying to your letter of the 20th of last June, by which you request additional information, which I now submit to you, as follows:

1. The 24 packing tables were installed, 6 on the ground floor and 18 on the second, as shown by the drawing, more or less.

2. The 24 wardrobes were, 8 on the ground floor and 16 on the second, more or less, as shown by the drawing and they measured about 18 inches in depth.

3. The 8 stamping machines were distributed 6 on the ground floor and 2 on the second, as shown in the drawing.

4. The wooden filing cabinets were installed in the office and they measured 60 inches high by 14 inches wide and 24 inches deep, more or less.

[fol. 275] 5. The desks were installed, 4 on the ground floor and one on the upper floor; the closet for keeping paper was in the office next to the files, as shown by the drawing.

6. Upon the bench spaces there were two other machines in addition to the 86 mentioned before; one was used as a substitute and the other was in actual use, making a total of 88 machines for the three sections. There were also five machines, each one of which was installed as a separate unit with its motor. Each of the three cutting machines was installed upon one of the three cutting tables. The two perforating machines were upon the ground floor, more or less as shown by the drawing. There were 3 replacement machines on the ground floor, as shown by the drawing and the other machines not in actual use were on the second floor at the place indicated in the drawing as "Estanteria de maquinas demontadas, accesorios y un abanico" (Shelf for dismounted machines, accessories and one fan).

7. The space for the counter and the railing for the office and for storage of merchandise may be seen in the drawing as it is not possible to give it to you exactly.

8. The shelves were, 9 down stairs and 9 upstairs, approximately, as shown in the drawing.

9. The shelves for the machine stores are shown in the drawing by an X, on the upper floor.

10. The individual shelves were in the basement and were of the ordinary size.

11. The drawing shows approximately the situation and area of the ironing department on the ground floor; there were also three irons upstairs, as shown by the drawing.

12. The eleven motors claimed were: 3 for moving the machines of the three sections; 5 were attached to the individual machines and 3 were kept for replacement on the second floor, behind the elevator, approximately as shown by the drawing.

13. The lot of accessories was on the second floor, in the same place where the replacement machines were kept and shown in the drawing as (shelf for dismounted machines,

accessories, etc.) "Estanteria de maquinas desmontadas, accessorios, etc.".

[fol. 276] 14. The folding chairs were wooden and it is difficult to specify how many of them were at each place.

15. The 86 bench spaces were double spaces.

16. I am sending herewith a sketch of the approximate position of all these objects, as per your request.

The merchandise which had been recently purchased was in process of cutting and manufacture; and the merchandise in process of manufacture and ready for shipment was, either in the wardrobes, or in the shelves, or being pressed, or in the cutting tables, or being stamped, etc., according to the stage and necessities of the manufacturing process.

I enclose also a sworn declaration of the mechanic who was in charge of the machines, as being the person best authorized and having a better knowledge of the position and condition of these machines.

I hope that with this information you will bring this matter to end and that you will soon be in position to adjust and liquidate this loss, as time is pressing us and we are in need of closing this matter as soon as possible.

Yours, etc., Jose N. Berrios Berdecia, Treasurer
Jose Rivera Soler & Co., Inc.

EXHIBIT NO. 31 FOR PLAINTIFF (Translation)

Department of Justice of Puerto Rico

Office of the District Attorney

San Juan, P. R.

I, Marcelino Romany, District Attorney for the Judicial District of San Juan, P. R., hereby Certify:

That in this District Attorney's Office under my charge there does not exist at present any criminal case pending against Teodoro Rodriguez, Antonio Gonzalez, and Jose Rivera Soler, for the crime of fraudulent destruction of insured property, nor for any other crime.

At the request of the interested parties, I issue this certificate at San Juan, P. R., this 29th day of March, 1932.

M. Romany, District Attorney.

[fol. 277] EXHIBIT No. 32 FOR PLAINTIFF (Translation)

Sworn Statement

I, Manuel J. Wys, of full age, married, a mechanic and resident of San Juan, Ward of Santurce, under oath and of my own free will and without any personal interest, declare as follows:

That I am a mechanic by trade and that at the time of making this declaration I am an expert in the repairing, adjustment and inspection of sewing machines manufactured by Singer Sewing Machine Co. and by other manufacturers.

That at the present time I am employed on a salary basis by several clothing factories or shops in San Juan, Santurce and adjoining towns, in charge of repairing and giving all necessary attention to the machinery in several shops devoted to the manufacture of clothing.

That one of these shops under my supervision was that of Messrs. Jose Rivera Soler & Co. Inc., situated at Pumarada Street; Santurce, which shop was destroyed by fire on March 13, 1932.

That by reason of my employment as mechanic for said corporation I acquired personal knowledge of the number of machines, their brands and conditions, that were installed in said factory.

That the machines that were in actual use and in course of repairs in said factory on March 13, 1932, were the following:

56 Singer 95-10.
28 Singer 96-10.
8 Singer 95-1.
1 perforating with base.
1 pleating with base.
4 Wilcox machines.
1 perforating.
2 112 W. 115 two needles.
1 cutting U. S.
1 for lace curling
1 22 W 100 double sewing.
1 68-7 buttons.
2 Singer 95-12.
2 Singer 96-3
3 for making buttonholes.
1 covering buttons and accessories.
1 for piping.
1 for piping.
1 for pinking.
1 52 W 12 Closing shirts.
2 Eastman cutting.
1 81-5 for creasing.
1 114-1 buttons.
1 51-10 for tightening.

[fol. 278] That in accordance with my practice of inspecting every Saturday the machines in the said shop, on Saturday March 12, 1932, I made an inspection of the said shop and found everything in perfect condition.

That at the request of Jose N. Berrios Berdecia, of said corporation, I have made a drawing of the position in which said machines were installed, showing also the tables, furniture and equipment existing in said factory, as I was the mechanic in charge of the repairs and upkeeping of the machines and motors existing in said factory, which I visited constantly and at least twice every week.

That I make this declaration without any personal interest and of my free will, at the request of Mr. Jose N. Berrios Berdecia, Vice-President and Treasurer of said corporation "Jose Rivera Soler & Co. Inc."

In testimony whereof, I swear to and sign this declaration at San Juan, P. R., on July 6, 1932.

M. J. Wys.

Affidavit No. 1094.

Subscribed and sworn to before me, by the person above described, at San Juan, P. R., this 6th day of July, 1932. Lcdo. Carlos del Toro Fernandez, Notary Public. (Seal.)

EXHIBIT No. 33 FOR PLAINTIFF (Translation)

F. A. C. Hastrup

Loss Investigations and Adjustments

San Juan, Porto Rico, July 8, 1932.

Mr. Jose N. Berrios Berdecia, Treasurer of the Company, Jose Rivera Soler & Co., Inc., Guaynabo, P. R.

DEAR SIR:

We had the pleasure of receiving from your own hands your favor of the sixth instant and also a sworn statement, signed by Mr. Manuel J. Wys, dated July 6, 1932, and amended on the seventh of the same month, all of which we have carefully noted.

F. A. C. Hastrup, by Arthur R. Davila.

[fol. 279] EXHIBIT No. 34 FOR PLAINTIFF (Translation)

F. A. C. Hastrup

Loss Investigations and Adjustments

San Juan, Porto Rico, July 8, 1932.

Mr. J. N. Berrios Berdecia, Treasurer, J. Rivera Soler & Co. Inc., Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

At the last hour of yesterday, we received from the Insurance Company interested in the above case, a letter requesting additional information relative to said case, and we beg to so inform you in order that you may at your best and earliest convenience supply the said data and facilitate our work of investigation.

The data to which the Company refers is as follows:

1. A detailed written statement of the materials which you had distributed throughout the island, to which firm they belonged and in whose hands they were at the time of the fire.

2. A detailed statement of all shipments made to all firms having any interest thereon, after the occurrence of the fire.

3. A detailed statement of all work received from the Island and belonging to the corporation, after the date of the fire.

4. Origin of the machinery, equipment and materials brought into the corporation by Jose Rivera Soler, as his private property and credited to his account.

Yours, etc., F. A. C. Hastrup, by Arthur R. Davila.

EXHIBIT No. 35 FOR PLAINTIFF

July 22nd, 1932.

Mr. F. A. C. Hastrup, Adjuster, United Firemen's Insurance Co., of Philadelphia, San Juan, P. R.

Re Claim of Jose Rivera Soler & Co. Inc., Policy No.13380

DEAR SIR:

This is to inform you that I have been retained by Jose Rivera Soler & Co. Inc., to represent the said Corporation in the matter of their claim against United Firemen's Insurance Company of Philadelphia, for indemnity under Policy No. 13380, for the loss sustained by the claimant [fol. 280] corporation, as a consequence of the fire which occurred on the 13th of March, 1932.

I have made a careful study of all the documents and books submitted to me by my clients and I have advised them that in my opinion they have already submitted to the Insurer sufficient evidence and information to enable the said Insurer to make up its mind as to whether or not they should pay the loss sustained by my clients.

With reference to your letter of July 8th, 1932, addressed to the Insured, which is the only communication from you pending reply, I must inform you that the data required by the Company under paragraphs numbered 1, 2 and 3 of your said letter is contained in the books of account and other documents submitted to you by the claimant, in compliance with your different requests. The Books of Accounts were kept by you for over three months, which gave you an ample opportunity to get from them all the information requested by you in your said letter of July 8th.

In reply to paragraph 4 of your said letter, whereby you requested information as to the origin of the machinery, equipment and materials transferred by Jose Rivera Soler to the Corporation, I am instructed to inform you that part of the said machinery was acquired by purchase from Mr. H. Fine, of New York City. Some of the machinery were acquired from other dealers in New York.

On behalf of my client I desire to notify you that the claimant Jose Rivera Soler & Co. Inc., shall expect payment of this claim on or before the 1st day of August, 1932,

after which date they will proceed to take such steps as may be advised for the protection of their interests.

Hoping that you will use your personal influence with the Company for the amicable settlement of this case, I remain,

Very truly yours, Martin Travieso.

MT/ps.

[fol. 281] EXHIBIT No. 36 FOR PLAINTIFF

F. A. C. Hastrup

Loss Investigations and Adjustments

San Juan, Porto Rico, July 23rd, 1932.

Mr. Martin Travieso, Attorney-at-Law, San Juan, Pto. Rico.

Re Claim of Jose Rivera Soler & Co. Inc.

MY DEAR MR. TRAVIESO:

I beg to thank you for your valued communication of yesterday in regard to the above captioned claim, and I am very glad to hear that you have been retained by the Assured as to same, because you will understand that as long as the insured corporation does not comply with all its duties under the policy requirements and those of the "Iron Safe Clause" which forms part of the contract, I can do nothing to bring this matter to a mutually satisfactory close, and if you consider that they have complied with all of their obligations and have furnished this office with everything we had a perfect right to ask them, verbally and in writing, in substantiation of their claim, then I am sorry to say that you do not have to wait until after the first of August next to start legal action.

Very truly yours, F. A. C. Hastrup.

FACH/mf.

EXHIBIT No. 37 FOR PLAINTIFF (Translation)

San Juan, P. R., April 22, 1932.

Mr. Jose N. Berrios, Representative, Jose River Soler & Co., Inc., Guaynabo, P. R.

Re Fire of March 13, 1932

DEAR SIR:

It is absolutely necessary that you deliver to this office all the (petty cash) vouchers from January 1st to March 13, 1932, as well as the cancelled checks or stub books for the same period, in order that we may continue the revision of the books of account which are now in our hands, all in accordance with the adjustment agreement signed between us.

We are pleased to remain,

Yours, etc., F. A. C. Hastrup, by Arthur R. Davila.

[fol. 282] EXHIBIT No. 38 FOR PLAINTIFF

This exhibit consists of 15 ledger sheets of the current account of J. Rivera Soler & Co., Inc., with the Banco Comercial de Puerto Rico not susceptible of transcription and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBITS 39 A AND 39 B FOR PLAINTIFF

These exhibits consist of two plans not susceptible of transcription and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBIT No. 40 FOR PLAINTIFF (Translation)

Statement of the Machinery, Furniture, Implements and Accessories brought by Jose Rivera Soler, personally, and by Escudero, Pumarada and Vall-Lloveras, when the last three came in as stockholders

36 machines 95–10	at	$71.60	$2,577.60
2 machines 96–10		51.50	103.00
2 machines for buttonholes		328.00	656.00
2 machines double needle 112″ 115		205	410.00
1 machine 52″ 12 for closing shirts		202.00	202.00
2 machines 81–5 for piping		160.00	320.00
2 machines 114–35 for sewing buttons		205.00	410.00
2 machines 22W110 double stitching		172.00	344.00
1 machine for tightening			140.00
2 machines Eastman, for cutting		250.00	500.00
1 machine 68–17 for sewing buttons			190.00
1 machine for curling laces			75.00
1 machine for piping			67.50
1 lot of accessories			80.57
60 spaces for benches, bancadas		19.50	1,170.00
3 dozens Eastman knives		3.00	9.00
3 dozens Delbon knives		4.58	13.75
42 ball bearings		5.00	210.00
1 motor G. E. 2 HP			120.00

[fol. 283]

3 motors 1/4 HP		11.00	33.00
2 motors with attachments 3/4 HP		25.00	50.00
10 iron pulleys		6.00	60.00
1 apparatus for attaching to machines			20.00
3 individual shelves		17.00	51.00
50 feet of belting, three inches		.50	25.00
1 attachment for making pipings			75.00
96 folding chairs		1.25	120.00
6 manikins (forms)		5.00	30.00
2 large cutting scissors		3.50	7.00
3 rulers		1.25	3.75
100 drawn patterns with copies		2.00	200.00
14 electric irons, 4 pounds		3.00	42.00
20 ironing boards		3.50	70.00
1 long cutting table			105.00
12 packing tables		10.00	120.00
6 wardrobes		12.00	72.00
1 wall clock			15.00
8 shelves stands		15.00	120.00
6 shelves for machine stores		15.00	90.00
2 warehouse wheel carriers		3.00	6.00
6 long tables		15.00	90.00
59 thread carriers		2.50	147.50
59 transmissions		7.00	413.00
2 desks			117.50

EXHIBIT No. 40 FOR PLAINTIFF (Translation)—Continued

1 typewriter table	7.50
1 sectional wooden filing cabinet	15.00
1 desk chair	12.50
1 cabinet for letter paper	3.75
1 railing for the office	125.00
Receipt for deposit for electric current	25.00
Total	$9,869.92
To be credited to:	
Jose Rivera Soler	$7,869.92
Escudero, Pumarada and Vall-Lloveras	2,000.00

[fol. 284] EXHIBIT No. 41 FOR PLAINTIFF

This exhibit consists of a card board box containing two small card board boxes and ten envelopes of petty cash vouchers not susceptible of transcription, and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBIT No. 42 FOR PLAINTIFF

This exhibit consists of a plan, the original of which will be forwarded to the Circuit Court of Appeals.

Defendant's Documentary Evidence

EXHIBIT No. 1 FOR DEFENDANT (Translation)

Certified Copy

Number Twenty-Three—Purchase and Sale and Assignment—

At San Juan, Puerto Rico, on the eighteenth day of April nineteen hundred thirty-one. Before me, Heriberto Torres Sola, attorney-at-law and Notary Public of this Island, domiciled, residing and with offices open in the City of San Juan, Puerto, Rico, appear: On the one part: Mr. Carlos J. Torres, of full age, married, property owner and resident of San Juan; On another part: Mr. A. J.

Walter, of full age, married, industrialist and resident of San Juan, and Mr. Isaac Sacks, of full age, married, property owner and resident of San Juan. And on the other part: Mr. Manuel Pumarada, of full age, married, employee and resident of said city. I know the appearing parties and, according to their statements, I know their age, personal status and residence. They assure me that they have, and in my judgment they do have the necessary legal capacity to execute these presents, and of their own free will they state:

First. The appearing parties Torres, Walter and Sachs, who are the only members of the industrial partnership of this city known as "Walter, Sachs & Co., Limited, S. en C.", own the enterprise or business of manufacture of clothes known as "A. B. Z.", constituted as per deed number one hundred fourteen, of the fourteenth of October nineteen hundred and thirty, before the undersigned no- [fol. 285] tary, inscribed in the Mercantile Registry of San Juan at page number three thousand one hundred ninety-six, folio two hundred seven, of volume ninety of partnerships; Mr. Carlos J. Torres being a silent partner and Messrs. Sachs and Walter being the managing partners.

Second. Mr. Manuel Pumarada states that he appears as representative of the domestic corporation domiciled in this city, known as "International Manufacturing Co.", of which he is President.

Third. The partners Walter, Sachs Co., Limited, S. en C., state that said partnership is the owner of the following personal property, which are subject to the mortgage to be set forth in paragraph fourth hereinafter. Twenty-two sewing machines; one "side seamer" machine; two "Slure Setter" machines; one "center" Machine; one Center attachment; one overedging machine; one cutting machine; one for opening buttonholes; one three horsepower motor and another three-fourth horsepower motor; two "Pressing Trousser"; one three-fourth horsepower motor; one "Starting Box", another "Starting Box Special"; twenty-eight chairs; one large table for cutting; two small ones; two electric irons.

Fourth. That the mortgage encumbering said personal property is the one constituted on the fourteenth of Octo-

ber nineteen hundred thirty, as per private document before the undersigned notary, authenticated by affidavit number three thousand two hundred twenty-eight and inscribed in the Registry of Property of San Juan, First Section on the twenty-first day of October nineteen hundred thirty, by entry number sixty-seven, made at page seventy-nine of volume first of "Mortgages of Personal Property", said mortgage securing a promissory note signed on the date of the execution of said deed, by Walter, Sachs & Co., Limited, S. en C., for three thousand dollars, value received, payable on the fourteenth of April nineteen hundred thirty-one, to the order of Mr. Carlos J. Torres, on account of which promissory note, bearing interest at the rate of nine per cent per annum, have been paid one thousand dollars, there remaining unpaid only two thousand dollars thereof. And Mr. Torres and his partners having agreed to the assignment of the former's share in the partnership, and the latter having agreed with the corporation "International Manufacturing Co.," to the purchase and [fol. 286] sale of the personal property detailed hereinbefore, they carry to effect said agreements, as follows:

Purchase and Sale—First. Walter, Sachs & Co., Limited, S. en C., by its managing partners Messrs. Sachs and Walter, and with the consent of the silent partner Mr. Torres, sells to the corporation "International Manufacturing Co." the personal property detailed in paragraph third of this deed, transferring to said corporation its right of ownership as well as all rights inherent thereto, the purchaser, by its legal representative, acknowledging having received material possession of said personal property.

Second. This purchase and sale is carried to effect for the price of two thousand dollars, which is the balance owing on the above detailed promissory note, signed by the seller, which the corporation "International Manufacturing Co." obligates itself to pay to Mr. Torres, who accepts the change in debtor.

Third. The International Manufacturing Co., by its President, Mr. Manuel Pumarada, accepts this sale, subject to the mortgage mentioned in preceding paragraph fourth of this document.

partner in the partnership Walter, Sachs & Co., Limited, S. en C.,

Assignment of Share in Partnership—Fourth. Mr. Carlos J. Torres, assigns to Messrs. A. J. Walter and Isaac Sachs its share as silent partner in the partnership Walter Sachs & Co., Limited, S. en C., assigning to them all the rights belonging to him as silent partner, in the said partnership.

Fifth. The consideration of this transfer and assignment is the payment of the sum of one dollar, which the assignor acknowledges having received from the assignees, to whom he hereby extends receipt for said consideration or price.

Sixth. The assignees Sachs and Walter accept this assignment, whereby the partnership affected by the contracts becomes a general partnership, the name and style of said firm being, therefore changed and shall hereinafter be "Walter and Sachs, Limited." I advised the appearing parties of the proper legal warnings, inserting at the foot of the mortgage document detailed in the preliminary or expositive part of this deed, the proper note setting forth the sale of the personal property mortgaged. Such is the deed executed by the parties, incurring in the pertinent legal responsibilities. The parties and the witnesses read [fol. 287] this deed, after I advised them all of their right so to do, granted by law, and the parties approved and ratified the contents thereof, and they all sign before me and with me, the Notary; I certify as to everything set forth in this public instrument. With the said approval of the parties there was written between lines the word "and" and erased and rewritten "encumbering", which are valid; I Attest.

Carlos J. Torres. A. J. Walter. I. Sachs. Manuel Pumarada. M. Tous Soto. Louis A. Castro.

Signed, marked, sealed and paraphed. Heriberto Torres Sola, Notary Public.

The proper Internal Revenue stamps appear affixed and cancelled on the original.

This is a first copy for Mr. Manuel Pumarada, of the deed numbered as above, forming part of the Protocol of Public Instruments corresponding to the year nineteen hundred thirty-one, under my charge, to which I refer; conforms well and truly with the original of its contents, as

to which I certify, and I issue this copy, at San Juan, Puerto Rico, on the date of its execution.

Heriberto Torres Sola, Notary Public.

[There are affixed and cancelled a one dollar and a ten cent Internal Revenue stamp and the seal of the notary affixed.]

EXHIBIT No. 2 FOR DEFENDANT (Translation)

Inventory of Machines and Motors

First Floor Machines

Number	Type	Make
AB — 911285	95 - 10	"Singer"
EG — 8261404	95 - 10	"Singer"
AB — 660297	96 - 10	"Singer"

[fol. 288]

AB — 661176	96 - 10	"Singer"
G — 3891332	-	"Singer"
AB — 806491	96 - 10	"Singer"
G — 4520335	-	"Singer"
AB — 806156	-	"Singer"
AB — 606123	96 - 10	"Singer"
AB — 660426	96 - 10	"Singer"
G — 4081477	96 - 10	"Singer"
G — 4081335	95 - 1	"Singer"
G — 8264206	95 - 10	"Singer"
G — 3890116	95 - 10	"Singer"
L — 26960	-	"Wilcox & Gibbs"
AB — 098008	-	Unidentified
G — 8262252	95 - 10	"Singer"
G — 8266277	95 - 10	"Singer"
G — 8265279	-	"Singer"
AB — 511369	96 - 10	"Singer"
AB — 476460	96 - 10	"Singer"
W — 366512	71 - 30	"Singer"
G — 3971108	95 - 1	"Singer"
G — 3274860	96 - 3	"Singer"
G — 5300212	95 - 1	"Singer"
AB — 660316	96 - 10	"Singer"
AB — 806695	96 - 10	"Singer"
AB — 896702	96 - 10	"Singer"
AB — 660705	96 - 10	"Singer"
AB — 624199	95 - 10	"Singer"
G — 8261096	95 - 10	"Singer"
W — 456617	-	"Singer"
AB — 806524	96 - 10	"Singer"

EXHIBIT No. 2 FOR DEFENDANT (Translation)—Continued

Number	Type	Make
G — 0134047	95 - 10	"Singer"
AB — 806743	96 - 10	"Singer"
AB — 660375	96 - 10	"Singer"
W — 428071	112 W 115	"Singer"
AB — 511497	96 - 10	"Singer"
G — 4814845	-	"Singer"
[fol. 289]		
W — 505758	52 W 12	"Singer"
G — 8268846	95 - 10	"Singer"
G — 4082312	-	"Singer"
AB — 775212	95 - 10	"Singer"
G — 9562484	95 - 11	"Singer"
H — 440666	-	"Singer"
AB — 660169	96 - 10	"Singer"
AB — 66023	96 - 10	"Singer"
AB — 656596	95 - 10	"Singer"
G — 8261896	-	"Singer"
G — 9427020	95 - 10	"Singer"
W — 400162	71 - 30	"Singer"
G — 8265989	95 - 10	"Singer"
AB — 509265	95 - 10	"Singer"
W — 279493	112 W 115	"Singer"
AB — 658613	95 - 10	"Singer"
L — 38876	-	"Singer"
AB — 659678	96 - 10	"Singer"
AA — 499718	81 - 5	"Singer"
AB — 806244	96 - 10	"Singer"
	Basement	
G — 4681530	95 - 1	"Singer"
AB — 657096	95 - 10	"Singer"
G — 9427636	95 - 10	"Singer"
G — 9665875	-	"Singer"
G — 8264852	95 - 10	"Singer"
AB — 661201	96 - 10	"Singer"
G — 8259411	95 - 10	"Singer"
G — 0313621	95 - 10	"Singer"
W — 509211	71 - 32	"Singer"
AB — 66765	96 - 10	"Singer"
G — 8268797	95 - 10	"Singer"
G — 5300132	95 - 10	"Singer"
G — 9065906	95 - 10	"Singer"
AB — 775134	-	"Singer"
[fol. 290]		
G — 3970608	-	"Singer"
G — 0313531	95 - 10	"Singer"
AB — 911289	95 - 10	"Singer"
AB — 660178	96 - 10	"Singer"
G — 8260252	95 - 10	"Singer"
AB — 658891	95 - 10	"Singer"

EXHIBIT No. 2 FOR DEFENDANT (Translation)—Continued

Number	Type	Make
AB — 978405	95 - 10	"Singer"
G — 8262427	95 - 10	"Singer"
G — 8261172	95 - 10	"Singer"
AB — 660329	96 - 10	"Singer"
AB — 660423	-	"Singer"
G — 8001442	95 - 10	"Singer"
AB — 911014	95 - 10	"Singer"
AB — 775206	95 - 10	"Singer"
G — 9427514	-	"Singer"
G — 9561337	95 - 10	"Singer"

First Floor—Motors

Number	Type	Make
787499	R S 175 R. P. M. 3 horsepower. 60 cycles. 32-15 amp. 110-220 volts.	"Century"
———	3 horsepower "General Electric" 60 cycles continuous 14.5 amperes 1 face 110-220 volts	
———	2 horsepower "General Electric" 9.6 amper.	
[fol. 291]	1 face Form C 220 volts.	
406747	R S 1750 R. P. M. 2 horsepower 60 cycles 21.6-10.8 ampr. 112-220 volts.	"Century"
	Basement	
10376	1165 R. P. M. 3/4 horsepower 60 cycles 12-6 amprs. 104-208 volts.	"Century"
883235	1750 R. P. M. R S 60 cycles, Amp. 10-5, 34 horsepower, 110-220 volts. J. M. Canals. Jose Gumdalain. Enrique Paoli. J. Rios Algarin.	"Century"

EXHIBITS NOS. 3 AND 4 FOR DEFENDANT

These exhibits consist of three books of account not susceptible of transcription and the originals of which will be forwarded to the Circuit Court of Appeals.

EXHIBITS NOS. 5, 6, 7, 8, 9, 10 AND 11 FOR DEFENDANT

These exhibits consist of seven photographs not susceptible of transcription and the originals of which will be sent to the Circuit Court of Appeals.

[fol. 292] EXHIBIT NO. 12 FOR DEFENDANT (Translation)

F. A. C. HASTRUP

Loss Investigations and Adjustments

San Juan, Porto Rico

Agreement

It is hereby mutually understood and agreed by and between Jose Rivera Soler & Co., Inc., of Santurce, Puerto Rico, as party of the first part, and the United Firemen's Insurance Company, of Philadelphia, Pennsylvania, party of the second part, that any act done by the said party of the second part in the investigation of the causes and/or the fixing of the damages and losses suffered by the property of the party of the first part, alleged to have been caused in the fire which took place in the morning of March 13th, 1932, shall not invalidate any of the conditions of Policy No. 13380, in the hands of the party of the first part, nor can any such act be interpreted as a waiver by the party of the second part of the rights which it may have in accordance with the above mentioned policy.

It is further agreed that the only purpose of this agreement is that of preserving to each of the parties their respective rights and of facilitating an investigation of the causes of the fire and the evaluation of the damages and losses caused by the said fire.

Signed in triplicate at San Juan, P. R., this 17th day of March, 1932.

Jose Rivera Soler & Co., Insured. United Firemen's Insurance Co., of Philadelphia, Pennsylvania, by F. A. C. Hastrup, Adjuster of Losses.

EXHIBIT No. 13 FOR DEFENDANT

THE PEOPLE OF PUERTO RICO

DEPARTMENT OF FINANCE

Bureau of Property Tax

Corporation Schedule

For levying of taxes for fiscal year 1932-1933

Name of corporation—José Rivera Soler & Co., Inc.
[fol. 293] Place of incorporation—San Juan, P. R.
Business in which engaged—Sewing and embroidery.
Principal place of business—Pumarada Street, #4, Santurce:

Name and address of the directors, if it is a domestic corporation, or name and address of its agent in Porto Rico if it is incorporated outside of Porto Rico.

Capital Stock

Class.	Amount authorized—$10,000.00. Amount paid in on shares—$10,000. Market value of each—$100.
Gross earning during last business year	$49,910.20
Expenses during last business year	$49,439.20
Net income during last business year	$ 471.00

Total in Puerto Rico, San Juan

	Corporation	Valuation
Merchandise	$ 800.00	
Furniture	4,487.72	
Movable machinery	14,743.38	
Total	20,032.07	20,030.00

Basis for Assessment and Other Data

Capital For domestic Corporations Market value of	Valuation By the corporation	By the assessor.
100 shares—common—at $100 each	$10,000.00	
Undivided earnings	471.00	
Debt	16,157.55	
Total (Liabilities)	26,628.55	
Personal		
Cash on hand or on deposit	1,160	1,160
Notes receivable or other credits owned	725.47	
Tangible personal property—Exhibit No. 3	20,032.07	20,030.00
Total personal	21,917.54	21,190.00
Total real and personal property (assets of the corporation)		21,190.00

[fol. 294] Oath

I, Rafael Wolf, Secretary of Jose Rivera Soler & Co., Inc., being duly sworn say that to the best of my knowledge, information and belief the foregoing statement and those in the attached exhibit Nos. 1, 2, 3, 4, 5 (which are made a part hereof as fully as though a physical part of the statement set forth on the sheet) contains a full, true, and complete list of all property held by or belonging to the aforesaid—in the island of Porto Rico, on the fifteenth day of January, 1932, that all such property has been fully and fairly described and its true condition and value represented; that all interrogatories relating thereto have been fully and truthfully answered; and that I have in no case sought to mislead as to the quantity or quality of said property.

R. Wolf.

Subscribed and sworn before me at San Juan this 6 day of April 1932. Juan Martinez Chapel, Corporation Assessor.

All the above information shall be given as of January 15, 1932. It is absolutely necessary that all information asked herewith be answered in full, even when you have to answer no to some of the questions. No statement leaving any question unanswered shall be accepted by the Department.

The Assistant Treasurer of Puerta Rico, undersigned, certifies: that the foregoing schedule is a true and exact copy of its original which, for the fiscal year 1932-33 is on file in the office of the Assessor of Corporations, of this Department, in the name of Jose Rivera Soler & Co., Inc.

Said schedule has been examined and approved by the Assessor of Corporations and no tax receipt has yet been issued relative thereto.

And at the request of Mr. F. A. C. Hastrup, I issue these presents, with the official seal of this Department, at San Juan, Puerto Rico, on the second day of the month of June of the year nineteen hundred thirty-two.

F. Fano, Assistant Treasurer of Puerto Rico.

[Internal Revenue stamps for $1.50 cancelled. The seal of the department stamped.]

19—31

[fol. 295] EXHIBIT No. 14 FOR DEFENDANT
PR–851.

Comparative Statement of Stock on Hand as Given by the Handcraft Import Co., Inc., of New York, and by Jose Rivera Soler & Co., Inc., of San Juan, Puerto Rico.

Style	Handcraft	Soler	Style	Handcraft	Soler
216 Pants	1-2/12	1-1/12	3302 Pants	29-0	29-0
250	8-9	8-7	170 Creep.	0-11	0-11
280	2-2	2-1	175	0-4	0-4
283	3-0	1-4	177	1-10	1-11
289	7-1	7-0	843	10-2	18-10
1001	0-2	0-0	843-X	14-0	
1002	4-2	4-2	846	19-9	19-9
1003	0-7	28-5	845	21-3	21-3
1005	0-9	0-9	849	12-10	12-10
1102	0-5	0-5	850	3-7	3-7
2060	0-1	0-0	216 Tops	1-6	0-2
2062	1-11	2-4	217	0-1	0-2
2070	0-1	0-2	1001	1-10	1-0
2135	0-2	0-2	1003	1-5	1-4
2136	0-2	0-2	1102	0-1	0-2
2139	1-5	1-5	3001	1-8	1-9
2335	0-10	0-10	3003	0-4	0-5
3001	0-7	0-7	3004	0-1	0-2
3002	0-1	0-0	3005	0-7	0-7
3003	0-4	0-4	3009	8-10	8-11
3004	1-8	1-8	3501	21-9	39-9
3005	19-2	19-2	3502	11-10	13-10
3006	0-3	0-3	3503	13-4	13-4
3007	3-5	3-5	3504	27-7	27-7
3009	11-9	11-9	3507	30-2	30-2
3051	11-9	11-9	401 Dress	0-1	5-0
3010	18-1	18-1	402-X	4-10	4-10
3052	32-9	32-9	402	0-3	0-9
3201	7-7	7-7	402-X	0-5	0-5
[fol. 296]					
3202	11-4	11-4	405	0-2	0-2
3301	7-2	7-2	406	1-5	0-7
3303	3-3	3-3	408	0-7	0-4
3304	2-7	2-7	411	1-6	1-7
3305	0-7	0-7	415	0-5	0-6
3306	6-1	6-1	435	0-2	0-3
3307	6-4	6-4	436	2-8	2-8
3308	2-4	2-4	439	0-2	0-3
3309	6-4	6-4	443	0-2	0-3
3311	8-11	8-11	446	0-1	0-3
3312	0-10	0-10	501	0-1	0-0
3314	6-8	6-8	503	1-1	1-1
3501	13-1	13-1	507	0-5	0-6

EXHIBIT No. 14 FOR DEFENDANT—Continued

Style	Handcraft	Soler	Style	Handcraft	Soler
3502	6-5	6-5	509	2-11	2-11
3503	5-1	5-1	516	1-7	0-7
3506	13-6	13-6	43 samples of the styles listed in the claim of the Handcraft Import Company.		
3507	3-11	3-11			
3508	31-4	31-4			

EXHIBIT No. 15 FOR DEFENDANT (Translation).

Jose Rivera Soler & Co., Inc., General Inventory.

December 31st, 1931.

Machinery and accessories:

56	Singer machines 95-10	at $71.60	$4,009.60
2	Singer machines 95-12	56.50	113.00
28	Singer machines 96-10	51.50	1,442.00
3	Singer for buttonholes	328.00	984.00
8	Singer machines 95-10	49.80	398.40
2	Singer machines 96-3	49.80	99.60
1	perforating machine		40.00
1	machine for covering buttons and accessories		143.50
1	machine for pleating		500.00
1	binding machine		61.00
1	binding machine		67.50
4	Wilcox sewing machines	150.00	600.00

[fol. 297]

1	perforating machine		20.00
1	pinching machine for wool, and motor		48.00
2	112W115 two needle machines	205.00	410.00
1	52W12 machine for closing shirts		202.00
1	cutting machine U. S.		175.00
2	Eastman cutting machines	250.00	500.00
1	gathering machine, for lace		75.00
1	81-5 machine for overedging with 3 threads		160.00
1	22W100 machines for double sewing		172.00
1	machine for button sewing		205.00
1	68-7 button sewing machine		190.00
1	51-10 tracking machine		140.00
1	binding attachment		75.00
1	G. E. 2 HP motor		120.00
4	high current 3/1 HP motors	25.00	100.00
3	high current 1/4 HP motors	11.00	33.00
1	high current 3 HP motors		120.00
2	high current 3 HP motors	150.00	300.00
86	bench spaces	19.50	1677.00
86	thread carriers	2.50	212.50
85	transmissions	7.00	595.00
63	chumaceras	5.00	315.00
3	individual stands	17.00	51.00

EXHIBIT No. 15 FOR DEFENDANT (Translation)—Continued

Machinery and accessories:

240 feet of steel axle for machines	.40	96.00	
87 feet of 3" belt	.50	43.50	
1 lot of accessories for machines		233.50	
			$14,727.10
Furniture and Fixtures:			
12 maniquins (forms)	5.00	60.00	
4 large scissors	3.50	14.00	
6 rulers	1.25	7.50	
200 drawn and perforated patterns and copies	2.00	400.00	
3 doz. Eastman knives	3.00	9.00	
3 doz. Delbon knives	4.58	13.75	
[fol. 298]			
8 tables for stamping	10.00	80.00	
35 electric irons, of 4 lbs	3.00	105.00	
36 ironing tables	3.50	122.50	
1 ironing stand		25.00	
3 tables, for cutting	137.50	412.50	
24 wardrobes	12.00	288.00	
24 tables for packing	10.00	240.00	
18 shelves	15.00	270.00	
6 shelves for machines	15.00	90.00	
2 small carts for warehouse	5.00	10.00	
5 mechanical fans, with installation	70.00	350.00	
1 International electrical installation		100.00	
1 electrical installation made later		125.00	
1 counter and fence for receipt of merchandise		125.00	
1 fence for the office		125.00	
220 closing chairs	1.25	275.00	
6 long tables	15.00	90.00	
2 filters	5.00	10.00	
1 wall clock, upper floor		15.00	
1 wall clock, ground floor		25.00	
2 benches		4.00	
2 roller top desks	75.00	150.00	
1 table desk		75.00	
1 flat top double size desk		100.00	
1 small desk		15.00	
1 Royal typewriter		125.00	
2 typewriter tables		15.00	
1 sectional wooden file		35.00	
1 sectional wooden file		15.00	
3 metal card-index boxes	7.50	22.50	
1 check machine		30.00	
1 Burroughs adding machine		160.00	
3 desk chairs	12.50	37.50	
1 letter paper cabinet		3.75	
1 bookcase for paper		10.00	
			4,185.00

EXHIBIT No. 15 FOR DEFENDANT (Translation)--Continued

[fol. 299]

Printed Forms and Materials:			
450 liquidation notebooks	.15	63.00	
1 lot of cards for machines		11.00	
1 lot of cards for counter		9.00	
1 lot of correspondence paper		4.00	87.00
Materials for Manufacture:			
850 doz. sewing thread of 200 yds. at	.35	297.50	
220 lbs. embroidering thread of 6 threads	3.00	660.00	
105 lbs. of "glosilla" sewing thread	3.80	399.00	
300 cones of sewing thread	.85	255.00	
98 doz. sewing thread 0000	1.56	152.88	
36 kilogs. DMC embroidering thread	10.50	378.00	
97 boxes of ONT B24 embroidering thread	188.00	182.36	2,324.74
Merchandise:			
96 doz. pillow cases at	3.00	291.00	
132 doz. children's dresses	15.00	1,980.00	
30 doz. children's creepers	12.50	375.00	
40 doz. girls' dresses at	12.50	500.00	
140 lbs. perforating paper	36.00	50.40	
880 yds. linen cloth at	.55	484.00	
1600 yds. broadcloth at	.18	288.00	
2400 yds. assorted cloth at	.14	336.00	
40 doz. assorted table cloths at	18.00	720.00	
155 doz. assorted towels at	2.00	310.00	5,334.40
Labor on Merchandise on Stock:			
Handcraft Import Co		1,326.00	
Maderia Linen Importing Co		697.00	
Morris Greenberg		885.00	
Henry Block		340.00	
R. Shamah		90.50	
S. Jacobson Co		815.00	4,153.50
Grand Total			$30,811.74

[fol. 300] EXHIBIT No. 16 FOR DEFENDANT

Jose Rivera Soler & Co. Inc.

Largest organization in Porto Rico in Needle Works

P. O. Box 1312

San Juan, P. R. March 18th, 1932.

Handcraft Import Co., 121 West 27th St., New York, N. Y.

GENTLEMEN:

We are very sorry to inform you that on the night of the 13th a fire was developed in our factory which has been completely destroyed.

Accordingly with our figures it was about 150 or 200 dz. between pants and creepers and blouses lost on the said fire of your stock.

The balance was ours in hand of workers and we are organizing a new place to collect all the merchandise that is still out.

Please send us a complete statement of the merchandise that we have belonging to you to make a complete statement of the loss on your merchandise.

Hoping to hear from you soon, we beg to remain,

Jose Rivera Soler & Co. Inc., per J. Rivera Soler.

JRS/RW.

JUDGE'S CHARGE TO THE JURY

The Court: Gentlemen of the jury, in this case the issues of fact are to be determined by you from the testimony which has been introduced. You are supposed to be and I am sure that you are predisposed to be, and I am sure that you are free from any bias and that you approach the case, as you ought to approach it, just as disinterestedly as you would the solution of a problem in mathematics. The consequences of your finding is a matter about which you have no concern. You are concerned only in reaching an honest verdict, according to the law as I shall give it to you, and according to the facts as you find them to be. Now, if you should find a verdict for the plaintiff you will

write that on this piece of paper which will be handed you, [fol. 301] stating the amount which you find the plaintiff is entitled to recover. If you find a verdict for the defendant you will write it on the other piece of paper, or rather that is already written or printed, and you will sign it as foreman. Before the plaintiff is entitled to recover in this case it must make out by a greater weight of the evidence the material allegations of its complaint. If you find that the plaintiff has failed to establish any material allegation, that is, in fact, necessary as I shall endeavor to explain to you, then you can stop there because the plaintiff must recover, if it recovers at all, by the greater weight of the evidence, and by the greater weight of the evidence it must establish the material allegations of its complaint. The defendant is entitled to a verdict at your hands if the plaintiff fails to make out its case, or if the defendant by a greater weight of the evidence makes out its special allegations of defense, and I shall endeavor to state them to you.

The plaintiff brings this action against the defendant and alleges in the first paragraph of its complaint that it is a corporation engaged in a certain business, that it is incorporated under the laws of Puerto Rico. It alleges also that a contract of insurance was entered into between the plaintiff and the defendant on the ninth day of February, 1932. Defendant admits that allegation, so you need not make any further inquiry about that, and you start out with the assumption that the contract was entered into. The plaintiff further alleges that due to a fire on the 13th of March, 1932, it sustained loss, which loss was covered by the contract of insurance. The defendant does not admit that allegation. Therefore, you have to resort to the evidence to determine whether or not that is made out. That must be made out before the plaintiff can recover. Now the defendant interposes certain defenses which we call affirmative defenses, admitting that the contract was entered into. The contract is in writing. The defendant claims that that contract contains certain covenants or conditions which the plaintiff had agreed to comply with, otherwise the policy would not be in force. It is the duty of the court to construe that contract and tell the jury what it means.

Now this is a contract, as I have stated, of insurance. By its terms the defendant agreed that it would indemnify

[fol. 302] the plaintiff for a loss due to a fire provided the plaintiff did certain things, and the plaintiff agreed to do the things mentioned in the contract. If the plaintiff failed to observe the terms of the contract, it was not entitled to recover because it was the agreement between the parties that this contract was to be in force only in the event that the conditions of the contract were complied with by both parties. Of course, a person cannot be benefitted by a failure due to its own fault or negligence. Now what did this contract provide as to these conditions? It has what is referred to as the "Iron Safe Clause". That is a clause that has been construed as often by the courts of the United States, and other countries no doubt, possibly as much as any other provision of any contract. It is what we call a standard clause. It is in all contracts. It has been held by the courts as a reasonable condition. If an insurance company undertakes to indemnify one against loss, it is not unreasonable that the company assuming such obligation would require of a plaintiff that it do certain things. For instance, as in the iron safe clause, take an inventory of its stock of merchandise periodically, or at such time as the contract may require. Not only must it make an inventory, but that inventory must be an honest inventory. That doesn't mean that it is free from error. It may contain entries that are erroneously entered. It may omit entries which ought to be there but honestly overlooked; if there is a substantial—and you know what substantial means—, if there is a substantial compliance with that in taking the inventory, then that would meet the requirements of the iron safe clause, as far as the inventory is concerned. But the inventory must be taken, under the terms of this policy, within thirty days from the date of the policy unless there was an inventory made of this merchandise within twelve months previous to that. If such an inventory had been made previously, such an inventory as the policy contract contemplates, then it was not necessary to take one within thirty days.

Then under that clause the plaintiff must keep records. Now it need not keep any particular system or form of accounts, but they must be intelligent, they must be intelligible. They must not be fraudulently created. It must be such a record as shows the

operation of the transactions of the business and kept in such a way that men of ordinary intelligence [fol. 303] can take the record with such explanations as are appropriate and determine from the records what the condition of the business was, and the goods on hand at the time of the fire. That is the purpose of the record. There would be no purpose in keeping that record, unless there was such a purpose. It is necessary to enable the insurance company to determine the measure of its liability.

Then, under that clause, those records must be kept in a fire proof safe, an iron safe, or in some other place where the records cannot be lost by fire. They may be kept in some other building, away from the place where the insured goods are kept. Now the plaintiff is not under obligation to guarantee that the records so kept in an iron safe will not be destroyed by fire. They might be kept in an iron safe that would ordinarily be considered as adequate to protect against fire, but the fire might be of such duration and intensity as to destroy the records. But the plaintiff must exercise proper care to carry out that provision.

There is another provision in this contract which is equally pertinent and equally important. Under its terms the plaintiff may not wilfully and intentionally make a false statement as to goods on hand, as to value, if such statement is made with intent to defraud. Now the courts have held in many cases that where the statement is a matter of opinion, honestly made, even though it is an over valuation, that is not sufficient to void the contract. In one case that I recall at the moment, decided by the United States Supreme Court, the property valued by the assured was stated to be $15,000, which was destroyed. On the trial of the case the finding was that the property had never been worth more than eight thousand dollars. The court held that that did not void the contract, because the finding on the intention or purpose of the insured was that there was no intention to defraud. It was an estimate as to the value. Now, if it is an honest estimate, an honest mistake does not void contracts; but where the representation is made for the purpose of deceiving, for the purpose of perpetrating a fraud under the terms of this contract, the plaintiff cannot recover any amount because such a delib- [fol. 304] erate intention to defraud vitiates this contract

by its terms. I hope I have made that clear, that that is the meaning of the contract.

I charge you further that this contract is what is termed as an open contract of insurance. It is not a contract in which the value is agreed upon between the parties. That is what we call a valued contract. For instance, if the insurance company and the plaintiff in this case had wished to have what we know as a valued contract, they would have agreed at the time that the goods and property insured are of a certain value, and that is stated in the contract to be the value agreed upon. Then the defendant, having agreed that that was the fair value, would not be here in this court to dispute that; but where you have an open contract of insurance the amount stated in the policy is simply the maximum which may be recovered under the contract, and the plaintiff if it has met, substantially met, the conditions of the contract would be entitled to recover such damage as you found from the testimony was sustained by the fire.

The facts are for you. There has been testimony introduced as to the books. Now, gentlemen, if you find from the testimony that the books were fraudulently set up in anticipation of a destruction of the goods, if you find that from the testimony, that would be fraud and the courts of justice do not relieve any person or grant him any relief if his claim is a fraudulent one. You sometimes hear the expression that one must come into court with clean hands. That means that he must come in honestly. Now I repeat to you that an over valuation, if honestly made, and you must judge from the circumstances whether it is or not, does not void this contract. It all turns upon the question of good faith. You might own property which you consider to be worth a great deal more than it is actually worth, and you state that it is worth that and disclose the facts, as in the case of a mercantile concern. They had a loss, they submit their books, and in their claim for loss they submit the books and claim the property is worth so much. The books that they submit show that they paid much less for it. You must determine whether their intention was to defraud, or whether they honestly thought the property was worth more than they paid for it. You must consider in connection with that, that all of the rec-[fol. 305] ords are disclosed, no concealment, no deception, if you find such to be the case.

Now the plaintiff has requested me to charge you certain propositions of law applicable to this case. The defendant has also submitted a request, which I shall now submit to you. The plaintiff requests me to charge you as follows: "If you believe, from the evidence before you, that the plaintiff, within the time fixed in the policy, furnished to the defendant company what purported to be proofs of loss, though not in exact conformity with the terms of the policy, and that these proofs were accepted by the company without objection or without suggesting that they did not conform to the terms of the policy and objecting to them for that reason, then the defendant is estopped from claiming that such proofs were insufficient." Well, that is a sound proposition of law. Here the plaintiff was required to show in its proof of loss certain things, and it submits to the defendant such proofs of loss. I submit to you again that they must substantially set up its loss, and if the defendant accepts it and makes no objection to it, then the defendant cannot insist that the plaintiff had failed in that particular. It should advise the plaintiff as to additional information.

"If you believe from the evidence that the plaintiff furnished to the defendant company, in due time, what purported to be proofs of loss and that they were objected to upon the ground that they were not in exact conformity with the terms of the policy, still, if you further believe, from the evidence, that the defendant then denied any liability to the plaintiff under said policy, and declared that the company would not pay any alleged claim thereunder, then such declarations amounted to a waiver of any further proofs of loss, and the plaintiff was not under obligation to furnish any others." I charge you that if the defendant notified the plaintiff, upon the submission of proofs of loss as required under the policy, that it does not consider itself liable for any damages under the policy, there is no use to furnish any other proof of loss.

The next request I could not charge as requested, but I can with appropriate modifications. The construction of a policy is a matter for the court and not the jury. That is not your responsibility, and that part of the request as [fol. 306] to the proper rule in construing or interpreting the policy is a matter for the court and I have endeavored to construe it in accordance with the law as stated in this

request. Now, "the covenant and agreement contained in the policy before you, which provides that 'The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause' (that is, the Iron Safe Clause), does not mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly satisfy a man of ordinary intelligence of the truth of the claim." That is substantially what I have already charged you.

"The defendant company has alleged as one of its defenses that according to its information and belief the fire which destroyed the plaintiff's property was caused by the intentional and fraudulent acts of plaintiff's officers and employees or by persons acting in collusion or connivance with such officers and employees. Upon that issue, the defendant company has the affirmative, and it must satisfy you by a preponderance of the evidence that this plaintiff either directly or indirectly caused the destruction of the property by fire, in order to entitle it to the defense it has set up. If the evidence before you does not fully satisfy and convince you that the fire was caused by the voluntary act of the plaintiff or if said evidence leaves you in doubt as to the truth or falsity of the charge made by the defendant against the plaintiff, then it is your duty in either case to disregard the said charge and to find for the plaintiff on the said issue." I might say there if the evidence before you does not fully satisfy you and convince you by the greater weight of the evidence. That is, you determine that issue against the defendant unless the greater weight of the evidence satisfies you that that allegation is true. Now I think I should charge you in that connection that when we speak of the greater weight of the evidence we do not mean the greater number of witnesses; we do not mean the greater number of documents, but we mean evidence which carries greater weight in favor of a proposition than [fol. 307] all the evidence carries against it. In other words, we frequently use the illustration of the imaginary scale; evidence for it on one side, against it on the other side. The scales being in perfect balance the one that goes down is the greater weight of evidence.

"The defendant has also alleged as one of its defenses that some of the——"

Mr. Travieso: Your Honor, please, I would like to withdraw request No. 5, because it relates to a defense that has not been followed by the defendant.

The Court: Yes. So No. 5 is withdrawn. Now the next request I think I must modify to some extent. "The plaintiff has shown, by the testimony of Sebastian Solo, a broker of San Juan, that it was the said Solo who introduced Manuel I. Saldana, the agent of the defendant insurance company, to Jose Rivera Soler, the president of the plaintiff corporation; that the purpose of the introduction was to discuss the issuance of a policy of insurance on the life of said Rivera Soler; that after said discussion, Saldana, defendant's agent, started a discussion about the insurance against fire of the factory of the plaintiff; that the three of them, Saldana, Rivera Soler and Solo, made a thorough inspection of the premises and of the machines, merchandise and other property in the building; that Rivera Soler wanted to insure the plaintiff's property for a small amount, but Saldana, defendant's agent, insisted in that he should insure for the full value of the property, that being the sum of thirty thousand dollars, stating that if the property was insured for less than its total value, in case of loss by fire, the plaintiff company would be considered to be its own insurer for the amount not covered by the policy." All I am stating to you, gentlemen, is that there is testimony to that effect, not that it is established, but simply calling it to your attention, that they three, Sebastian Solo, Saldana and Rivera Soler made the inspection of the premises and of the machines and other property in the building; that Rivera Soler wanted to insure plaintiff's property for a small amount, or some such term as that, but Saldana, defendant's agent, insisted that he should insure for the full value of the property, that being the sum of $30,000, [fol. 308] stating that if the insurance was for less than the full value the plaintiff would be its own insurer for the difference. That is true, of course. That is carrying out the policy contract.

"I now charge you, that if you believe from the uncontradicted testimony of Sebastian Solo that the defendant's agent, at the time of the filing of the application for insur-

ance, saw the insured property. * * *" I cannot charge that. I will have to modify that, because it sets up the doctrine of estoppel. I have just charged you that where there is a valued contract and the parties agree upon a value then the doctrine of estoppel follows; but where there is an open policy and the agent of the company saw the property, the jury can consider that in determining whether there was misrepresentation about the value. That is for the jury to determine under the terms of this policy. The insurance company did not agree on that valuation, but agreed to pay all damages up to a certain amount; and this policy in that connection has three clauses. It has agreed to indemnify the plaintiff on the merchandise up to an amount not exceeding $15,000; on the machinery not exceeding $12,000, and on the printed supplies, equipment and things of that kind not exceeding $3,000. So if you find from the testimony that the machinery was worth over $12,000, you can only allow $12,000 for that property, and so with the other things. Now, I think this is a sound principle of law.

"The policy upon which this action is based contains what is known as the 'iron safe clause.' By the terms of said covenant the insurer is required: (1) To take a complete inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of the policy, the insured shall take an inventory within thirty day of the issuance of the policy; (2) To keep a set of books, from the date of inventory as provided in paragraph (1), and during the continuance of the policy; and (3) To keep the books and inventory, and also the last preceding inventory, if one has been taken, securely locked in a fireproof safe at night." Of course you gentlemen know that when your business is operating you cannot keep your books in the safe; you have them out.

[fol. 309] "It has been settled, by the weight of authority, that the iron safe clause, where properly made a part of the policy, is a promissory warranty, which must be regarded as a condition subsequent, for the reason that all of the promises therein contained are required to be performed by the insured from and after the date of the issuance of the policy. It being a condition subsequent, it should be construed strictly against the right of forfeiture

of the policy." Well, the law does not look with favor upon forfeitures, like it does not look with favor upon fraud. Fraud is never presumed. It must be proven. A person comes into court with the presumption that he is honest; in the criminal court with the presumption that he is innocent, and these things must be proven in this court by the greater weight of the evidence, and so in voiding the policy. The plaintiff was under obligation to the defendant from the date of this policy. No errors of bookkeeping prior to that, if the inventory was honestly made, will not void the contract.

"The defendant company has set up as a defense the alleged failure of the plaintiff to comply with the requirements of the 'iron safe clause', charging as a specific violation that the plaintiff failed to conform and comply with the provisions of said clause in that it failed to keep a set of books of accounts in accordance with the provisions of the said clause, and that it is impossible to determine from said books, papers and documents kept by the plaintiff the amount and value of the property destroyed by fire." That is what the defendant substantially alleges. "I charge you that a substantial compliance with the terms of the iron safe clause is sufficient; that you are the sole judges as to the sufficiency and weight of the evidence introduced by the plaintiff to satisfy you as to what was in its factory at the time of the fire and destroyed thereby; that it is for you to determine, from the books, papers and documents admitted as evidence and from the oral testimony presented by both sides, whether any property covered by the policy was destroyed by the fire of March 13th, 1932, and the market value thereof." Now in that connection, gentlemen, I charge you that a person is not bound by what he paid for property. He might buy it at a great sacrifice from the seller, or it might be donated. What he is entitled to re- [fol. 310] cover is the reasonable value at the time of the loss. I think I should charge you in this connection that if the president of this corporation bought property while he was president on his own account and then sold it to the corporation for a profit, that while he would be liable to his stockholders and should be held liable for the amount of the profit which he took out of the assets, that that would not stop the plaintiff from recovering on such property the

actual value. In other words, it is not applicable, as I construe the law, to this case.

Now the defendant has certain requests which I charge.

"You are instructed that the burden of proof rests upon the plaintiff to establish by a preponderance of evidence the amount of articles and merchandise insured under the policy that was in the building described in the policy at the time of the fire and that was destroyed by fire and also the value of such articles as of that date." That is good law, and that is what plaintiff in this case obligated itself to do. That is the very purpose of the conditions of this policy and you must find that by the greater weight of the evidence, because the plaintiff must establish that by the greater weight of the evidence.

"You are instructed that the several amounts in dollars fixed by the policy in no wise evidence any agreement as to the value of the different groups of articles and merchandise described in the policy, but represent the maximum sums or indemnities that the insurer agrees to pay provided that the fair value of the property belonging to any or all of the three groups, namely, merchandise, machinery and fixtures, destroyed by fire at the time of such fire equals or exceeds the maximum amounts so fixed as indemnity." That is the law, and I have already charged you.

"You are instructed that the policy of insurance, the subject of this litigation, contains a condition which reads in part as follows:

'If the claim made by the insured (in this case by J. Rivera Soler as president of J. Rivera Soler & Co. Inc.) be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy—all benefit under this policy shall be forfeited.' "

[fol. 311] I have already charged you that that condition is legal and part of the conditions of this contract.

"Such a condition is fair, valid and enforceable and you should keep the words thereof clearly in mind." Well, of course, you should keep all the testimony in mind.

"This condition required the insured to make honest and truthful representations and statements as to the property affected by the fire and as to the value of said property at

the time of the fire. By the terms of the policy any false and fraudulent statements or representations regarding the value of said property render the policy void.

"I charge that if you find that any of the values specified in the proof of loss furnished by the plaintiff to the defendant company were too high or exaggerated, and that the plaintiff caused or permitted the furnishing of such a claim for amounts greatly in excess of the amounts that the officers of the plaintiff corporation knew that such articles were worth with the intention and expectation of getting a greater amount of money for said articles than they were in fairness worth, then the plaintiff corporation was guilty of such fraudulent conduct as would make the policy void, and if you so find your verdict should be for the defendant." That is in connection with what I have already charged you, that when you come down to its final analysis, gentlemen, it is a question of good faith. Was this claim made in good faith?

"I further charge you that any statements made by the officers and agents of the plaintiff corporation concerning the amount or value of the property alleged to have been destroyed, or any statements as to the condition and value of said property written in the proof of claim, or made here on the witness stand, and that were made fraudulently and with the intention of fraud would render the policy void.

"The court further instructs you that if you believe by a preponderance of the evidence that any officer or agent of the plaintiff corporation submitted to the defendant in support of its claim any books containing any false entries or any fraudulent or false invoices for merchandise or machinery never received or for work never done, or increasing or exaggerating the value of any property alleged [fol. 312] to have been destroyed by the fire, the verdict should be for the defendant." For the simple reason that that would be a breach of the condition of the contract, if it is done as I have told you with the intention and purpose deliberately to defraud.

"I charge you that the burden of establishing fraud rests upon the defendant company. Such fraud on the part of the plaintiff must be established by a preponderance of the evidence. You are to consider the proof of loss submitted by the plaintiff to the defendant, which is in evidence, and

all the circumstances and facts to which the testimony of the witnesses has referred regarding the filing of said proof of claim and the facts and book entries submitted to substantiate the same and all other circumstances regarding the condition of the property and the nature and origin thereof.

"I further charge you that fraud need not be established by direct proof. In a great majority of cases where fraud exists, it becomes impossible to bring witnesses that can give direct proof that fraud exists. For this reason it may be established by circumstances that convince you that fraud was actually intended and committed by the plaintiff. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires." These circumstances, though, must be established. You cannot accept mere suggestions or suspicions, but it must be something which is established by proof. You could not ordinarily tell by direct proof what was in a person's mind. You judge that by his acts, by what he does. While I am on that subject, I may say that in all charges of this nature, as well as in every other issue tried in a court, circumstantial evidence is just as legal as any other evidence if it meets the requirements as to the measure of proof.

"I further charge you that if from the evidence produced at this trial you believe that the officers of the plaintiff corporation knowingly and wilfully made false statements regarding material facts set out in the proof of loss submitted to the court regarding the value and amount of property destroyed, the intention to deceive the defendant company must be necessarily implied as a natural consequence of said acts and you must then find for the defend- [fol. 313] ant." That is in conformity with what I have just charged you. If the circumstances are made out and lead you to that conclusion, of course the charge is made as if you had direct testimony, and in any event if you find in this case that the plaintiff failed to comply reasonably and substantially with the terms of the iron safe clause as to the matter of fraudulent and untrue statements, in either case the policy is void.

"In cases of this kind the plaintiff must come into court with clean hands. The insured is presumed to know better

than anyone else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims unless honestly made. It is intended to protect insurance companies from frauds which might otherwise be perpetrated on them and it is a rule which can do an honest man no harm." I might add that it is also a rule that conforms to public policy. These quotations would be supported upon that theory.

In regard to request number 4, I cannot charge it in the exact language as stated. I charge you that if the plaintiff in this case had a contract with anyone by which it agreed to manufacture certain garments at an agreed price per garment or per dozen, that those goods were manufactured and that they were lost in the fire, this policy covered the amount due the plaintiff for labor, and that the amount due the plaintiff, as I construe the contract, would be the contract price of labor. Imagine a case where an individual might do all of his own work, and has no laborers to pay, and he had a policy of this kind. I think it ought to be modified to that extent. But the plaintiff corporation is entitled to no profit on any of its loss, but only to receive the actual value.

As to request No. 5, I charge you that any property which may have been sold by the president of this corporation as an individual to his corporation, the value of that property is not to be determined by the price at which he sold it, nor by the price for which he bought it. What was its real, true honest value at the time of the loss.

"You are instructed that as to merchandise covered by [fol. 314] the policy of insurance plaintiff is entitled to recover the market value thereof as of the date of the fire and loss and that the burden is upon the plaintiff to prove the value of said merchandise at such time, and that if you find that the plaintiff has failed to establish such values your verdict should be for the defendant." That is true, gentlemen, because that is one of the material allegations. That the lost property was of a certain value, now the plaintiff must satisfy you not only that he lost the property but by the weight of the evidence its value. Otherwise, how can you find out its value? You cannot go into the jury room and find it. It may be by documentary evi-

dence, or testimony on the witness stand, but it must be by evidence.

"The court instructs the jury that it was the duty of the plaintiff to take a complete itemized inventory of its stock on hand within thirty days of the issuance of the policy unless such inventory had been taken within twelve calendar months prior to the date of the policy and that failure to do so would render the policy null and void. In this respect you are instructed that if you find that the inventory of December 31st, 1931, presented in evidence by plaintiff does not constitute such complete itemized inventory of stock covered by the policy of insurance, then your verdict should be for the defendant." That charge, in connection with what I have already said on that subject.

"You are instructed that any indemnity for destruction of merchandise covered by the policy of insurance is measured by the market value of such merchandise at the time or immediately after the date of the destruction of such merchandise by fire."

I think I am going to reconsider and charge this 4th request, because in reaching my conclusion on it I overlooked the fact that the plaintiff is a corporation. I charge you, then, as to this fourth request: "You are instructed that there is no evidence from which the cost of labor claimed in the complaint and in the proof of claim, in the amount of $2,524.50 can be determined and that as to so much of the said claim you should find for the defendant." Now I charge you that, with this modification: unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this [fol. 315] particular merchandise. If you find the evidence—I do not recall it, but if you find it from the record then you can find only for such amount as the plaintiff actually paid for labor.

Now gentlemen, in reaching your verdict, if you find for the plaintiff, the plaintiff is entitled to interest on this claim from the time of the loss, and it should be paid. What is the rate that you ask for, Mr. Travieso?

Mr. Travieso: The legal rate of interest, six percent.

The Court: Is that a correct statement of the legal rate here?

Mr. Travieso: Yes, sir.

The Court: If you determine that the plaintiff is entitled to anything, then you can calculate interest at six percent. If on the other hand, as I have already charged you, you find that the plaintiff has failed to observe the obligations of this contract, which I have stated to you, or either one of them, if you find for instance that the plaintiff failed to comply with the terms of the iron safe clause, there is no use to go any further in the case. You can stop right there and write a verdict for the defendant, because whatever else you might find, the policy is void. Also, if you find that the allegation of fraud, deliberate and intentional, and attempts to deceive as to the value of the property, if you find that the defendant has made that out with a great deal of strength, there is no use to go on. On the other hand, if you find with the greater weight of evidence that the plaintiff has substantially met the requirements of the policy then your verdict should be for the plaintiff for such amount as you find from the evidence represents actual loss sustained by the plaintiff at the time of the fire.

Mr. Brown. Your Honor please, the defendant would like to enter exceptions to certain parts of the charge of the court. As to the first request of plaintiff, that if the proof of loss was taken without objection that the defendant is estopped from claiming that the proofs of loss are insufficient; and also to the second instruction given that if they find that if after the proofs of loss were delivered the defendant later denied liability it was a waiver of any defects in the proofs of loss.

The Court: Not any defects prior to that time; if that is [fol. 316] what the request means it ought to be modified to that extent but any subsequent——

Mr. Brown: Yes.

The Court: That is what I tried to charge the jury. That is not a waiver of anything prior to that, but if the defendant company notified the plaintiff that it denies liability it waives any further requirements of proof of loss, having notified the plaintiff that it is not liable, but it does not waive any requirements prior to that. In other words, it may have denied liability and still have a right to insist upon that.

Mr. Brown: With that modification, that is satisfactory. I think it was the sixth instruction asked by the plaintiff which recites the testimony of a witness Solo as to conver-

sations as to what Saldana did at the premises prior to the insurance, the charge being that the fact that Saldana was there and saw the premises might be considered by the jury in connection with any charge of misrepresentation as to amount. That is excepted to because there is no issue of misrepresentation in this case. There is no charge that prior to the issuance of the policy the plaintiff made representations that were acted upon.

The Court: With that statement, I think that request goes out of the case. I had understood that there was a contention that plaintiff had misrepresented the goods on hand at the time the policy was issued, as well as the goods on hand at the time of the fire. That being the case, I will instruct you, gentlemen of the jury, to disregard that request because it can only apply to misrepresentation made at the time the policy of insurance was entered into, and since there was no such misrepresentation the charge does not apply.

Mr. Brown: In order to save the point, I want to except to so much of the fourth instruction of the defendant as given by the court as adds: "if the jury should find that the cost of labor on articles destroyed by the fire can be ascertained from the books."

The Court: Yes. That was the defendant's request.

Mr. Brown: Yes, that is the fourth request; and finally an exception as to the denial of the ninth instruction, instruction No. 9.

[fol. 317] The Court: Now, gentlemen, you may retire to your room and consider your verdict.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, Attorneys for Defendant, by G. E. Gonzalez.

CERTIFICATE APPROVING BILL OF EXCEPTIONS—Filed November 17, 1934

The bill of exceptions, filed in this case by appellant on the 18th of October, 1934, contains all of the evidence given or offered in the trial of the cause of Jose Rivera Soler & Co. Inc., Plaintiff, v. The United Firemen's Insurance Co. of Philadelphia, Defendant, and correctly shows the proceedings had on said trial, and said bill of exceptions is cor-

rect in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Dated at San Juan, Puerto Rico, this seventeenth day of November, 1934.

Robert A. Cooper, Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR FORWARDING OF THE ORIGINAL EXHIBITS TO THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed November 20, 1934

Comes now the defendant-appellant, by its undersigned attorneys, and alleges:

That at the trial held in this case the parties offered in evidence books of account, papers and photographs which were not susceptible of transcription in the bill of exceptions filed by the appellant in this case and approved and settled by this court, and that said books of account, papers and photographs were admitted in evidence and marked as follows:

A. Exhibits Nos. 1 to 10, both inclusive, for plaintiff, consisting of books of account.

B. Exhibit 12 for plaintiff, consisting of nine ledger [fol. 318] sheets of the current account of Jose Rivera Soler & Co. Inc. with The Royal Bank of Canada.

C. Exhibits 13a to 13f, both inclusive, for plaintiff, consisting of six box-files of vouchers.

D. Exhibit 14 for plaintiff, consisting of twenty-four sheets of stocks account of plaintiff with the Handcraft Import Company.

E. Exhibit 15 for plaintiff, consisting of a book of account.

F. Exhibit 38 for plaintiff, consisting of fifteen ledger sheets of the current account of plaintiff with the Banco Comercial de Puerto Rico.

G. Exhibits 39a and 39b for plaintiff, consisting of two plans.

H. Exhibit 41 for plaintiff, consisting of a cardboard box containing two small cardboard boxes and ten envelopes of petty-cash vouchers.

I. Exhibit 42 for plaintiff, consisting of a plan.

J. Exhibits 3 and 4 for defendant, consisting of three books of account.

K. Exhibits 5 to 11, both inclusive, for defendant, consisting of seven photographs.

Wherefore appellant prays that an order be entered in this case directing and authorizing the clerk of this court to forward said original exhibits to the United States Circuit Court of Appeals for the First Circuit, to form a part of the record on appeal in this case.

San Juan, Puerto Rico, November 20, 1934.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, W. L. Butte, Attorneys for Appellant, by G. E. Gonzalez.

Notified with copy this twentieth day of November, 1934.

Martin Travieso, Attorney for Appellee.

[fol. 319] IN UNITED STATES DISTRICT COURT

ORDER TO SEND ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS—Filed November 20, 1934

On the motion of G. E. Gonzalez, Esq., attorney for the United Firemen's Insurance Company of Philadelphia, defendant-appellant, it is ordered

That in addition to the transcript of the record on appeal in this action, the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals for the First Circuit Court at Boston, Massachusetts, the following original books, papers and photographs and plans, to be by him kept and returned to this court upon the final determination of this action in said Circuit Court of Appeals, namely:

A. Exhibits Nos. 1 to 10, both inclusive, for plaintiff, consisting of books of account.

B. Exhibit 12 for plaintiff, consisting of nine ledger sheets of the current account of Jose Rivera Soler & Co. Inc. with The Royal Bank of Canada.

C. Exhibits 13a to 13f, both inclusive, for plaintiff, consisting of six box-files of vouchers.

D. Exhibit 14 for plaintiff, consisting of twenty-four sheets of stocks account of plaintiff with the Handcraft Import Company.

E. Exhibit 15 for plaintiff, consisting of a book of account.

F. Exhibit 38 for plaintiff, consisting of fifteen ledger sheets of the current account of plaintiff with the Banco Comercial de Puerto Rico.

G. Exhibits 39a and 39b for plaintiff, consisting of two plans.

H. Exhibit 41 for plaintiff, consisting of a cardboard box containing two small cardboard boxes and ten envelopes of petty-cash vouchers.

I. Exhibit 42 for plaintiff, consisting of a plan.

J. Exhibits 3 and 4 for defendant, consisting of three books of account.

K. Exhibits 5 to 11, both inclusive, for defendant, consisting of seven photographs.

[fol. 320] San Juan, P. R., November 20, 1934.

Robert A. Cooper, District Judge.

IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed November 20, 1934

To the Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Second amended complaint, filed May 20, 1933, omitting copy of the policy of insurance filed to form a part

thereof on February 17, 1933. This policy of insurance is copied in the bill of exceptions, Exhibit 11 for plaintiff.

2. Answer to second amended complaint, filed June 2, 1933.

3. Journal entries of trial.

4. Motion for directed verdict, filed May 15, 1934.

5. Plaintiff's request for instructions to the jury, filed May 16, 1934.

6. Defendant's request for instructions to the jury, filed May 16, 1934.

7. Defendant's additional request for instructions to the jury, filed May 16, 1934.

8. Verdict, filed May 17, 1934.

9. Judgment, filed May 31, 1934.

10. Petition for appeal, assignment of errors and order allowing appeal and fixing bond, filed June 9, 1934.

11. Appeal bond and order approving appeal bond, filed June 12, 1934.

12. Citation on appeal, filed June 12, 1934.

13. Motions and orders extending time to file bill of exceptions and record on appeal.

14. Bill of exceptions, filed October 18, 1934.

15. Order approving bill of exceptions.

[fol. 321] 16. Motion and order for forwarding original exhibits to the Circuit Court of Appeals.

17. This præcipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the First Circuit and to be filed at the office of the clerk of said Circuit Court of Appeals, at Boston, Mass,, on or before the tenth day of December, 1934, or before the date that may be fixed by this court if such term should be enlarged.

San Juan, P. R., November 20, 1934.

Henri Brown, C. Ruiz Nazario, G. E. Gonzalez, W. L. Butte, Attorneys for Appellant, by G. E. Gonzalez.

Service of the above præcipe accepted and acknowledged this twentieth day of November, 1934.

Martin Travieso, Attorney for Appellee.

Clerk's certificate to foregoing record omitted in printing.

[fol. 322] [Memorandum.—Orders of enlargement of time for docketing case to, and including, January 10, 1935, are here omitted. A. I. Charron, Clerk.]

[fol. 323] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1934

No. 2299

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA, Defendant, Appellant,

v.

JOSE RIVERA SOLER & Co., INC., Plaintiff, Appellee

Appeal from the District Court of the United States for the District of Puerto Rico.

Before Bingham, Wilson and Morton, JJ.

OPINION—May 25, 1935

MORTON, J.:

This is an appeal by the defendant from a verdict and judgment for the plaintiff in an action on a fire insurance policy. The principal ground of appeal is the refusal of the District Judge to direct a verdict for the defendant, but certain other grounds are also urged. There was evidence of the following facts:

The plaintiff, Soler & Co., Inc., manufactured cloth into garments and other articles at its factory in a suburb of San Juan, P. R. The greater part of the work was sewing and embroidering. It was an establishment of substantial size employing many persons; its equipment comprised more than 100 machines of various kinds, electric motors, etc. At the time of the fire there was, according to the plaintiff's contentions, a large amount of cloth on hand, both silk and cotton, partly the property of the plaintiff [fol. 324] and partly of other persons who had sent it there to be manufactured. The plaintiff did not own the building. The policy in question covered the stock of merchandise, the machinery, and the fixtures and furniture, each to a stated amount, the total being $30,000. It was dated 9

February 1932. On the night of March 12-13, 1932, the whole property was destroyed by fire. Formal proofs of loss were duly made and on the defendant's refusal to pay the present action was brought.

There was no claim that the policy did not attach when issued. The defenses now relied upon rest upon breaches of what are commonly referred to as "conditions subsequent", the real defense being that the plaintiff's claim was essentially fraudulent. The provisions of the policy relied on in defense are the so-called "Iron Safe" clause and condition 12. The "Iron Safe" clause reads as follows:

"1st. The Assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date and upon demand of the Assured the unearned premium from such date shall be returned.

"2nd. The Assured will keep a set of books, which shall clearly and plainly present a *complete record of business transacted,* including all *purchases, sales* and *shipments,* both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy. (Italics supplied.)

"3rd. The Assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times, when the building mentioned in this policy is not actually open for business; or failing in this, the Assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void."

[fol. 325] Condition 12 provides:

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof or if any fraudulent means or devices are used by the Insured or

anyone acting on his behalf; * * * all benefit under this policy shall be forfeited."

There are ten assignments of error, the first seven of which relate to the refusal of the District Judge to direct a verdict for the defendant, and the next two to rulings or refusals to rule with respect to damages. The last assignment appears not to be based on any ruling by the trial judge and attempts to bring directly to this court the question whether the verdict and judgment are contrary to law because the amount of damages found by the jury is so much less than the amount of the plaintiff's claim as to prove conclusively that the claim involved fraud. There is no assignment of error with respect to any rulings of law on the portions of the policy relied on in defense. The law of the case was clearly and accurately explained to the jury in a manner which it would not be easy to improve upon.

As to the questions of evidence involved in the first seven assignments of error, the gist of these is that breach of certain conditions of the "Iron Safe" clause and of clause 12 was so clearly established by the evidence considered as a whole that the defendant was entitled to a directed verdict. The plaintiff offered the evidence of several witnesses, including an expert accountant to the effect that its books and accounts were of such character as to afford a reasonably complete picture of its business activities, that they were honestly made and kept as required by the policy, and that the proofs of loss conformed to the books and were honest. While the defendant introduced a good deal of evidence to the contrary through witnesses who testified that the books and records were incomplete and insufficient, and not properly kept, and showed clear indications of having been fabricated, the questions were plainly for the jury to deter-[fol. 326] mine. These assignments of error cannot be sustained. Nor can it be said that the evidence, as a whole so clearly established fraud on the part of the plaintiff that the defendant was entitled to a directed verdict on that ground.

As to the tenth assignment of error the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. The defendant contends that the verdict, fixing the value of the prop-

erty at only about one half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent over-valuation by the plaintiff in the proof of loss. Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it.

The remaining assignments of error, the eighth and ninth, relate to the refusal of the trial judge to instruct the jury as to certain items in the plaintiff's claim, that there was no evidence of the value of them. The first of these items is "the cost of labor claimed in the complaint and in the proof of claim in the amount of $2524.56." The policy covered by its terms, the expense to the plaintiff of labor which it had put upon goods of other parties which were sent to it to be manufactured and were destroyed in the fire. The defendant's contention is that there was no evidence as to the value of such labor. The expert accountant called by the plaintiff testified that this item appeared on its books, and he referred the item to certain vouchers which constituted part of the plaintiff's records. The proof of loss, which was sworn to, was put in evidence; it contained the item in question. The plaintiff's president, Mr. [fols. 327 & 328] Soler, was examined and cross-examined with reference to this proof of claim and to various items in it including this one about which he testified at some length. The details which made up this amount were not presented, nor do they appear to have been specifically called for by the defendant during the trial. From the testimony of the accountant they may have appeared on slips and other informal records which were put in evidence. The District Judge left the matter to the jury saying that this amount was not recoverable "unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence,—I do not recall it,—but if you find it from the record then you can find only for such amount as the plaintiff actually paid for labor." We think this ruling was correct.

The ninth assignment of error relates to merchandise alleged to have been sold to the plaintiff by its president, Mr. Soler, and to the refusal of the trial judge to rule that there was no evidence from which its values could be found. It was a much controverted item as to which a good deal of evidence was introduced. We cannot say that there was not sufficient evidence before the jury to enable them to put a value on this merchandise if they found that the plaintiff was entitled to recover for it, which is entirely uncertain.

The judgment of the District Court is affirmed with costs.

[fol. 329] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the District of Puerto Rico

PETITION FOR REHEARING

Comes Now the above named appellant and respectfully petitions this Honorable Court to vacate the judgment entered in the above entitled cause on May 25, 1935, and grant a rehearing, and as grounds therefor the appellant respectfully submits the following:

On May 25, 1935, the court handed down an opinion and entered a judgment by which the judgment of the District Court in this case was affirmed with costs. That result was reached by refusing to consider appellant's tenth assignment of error that the verdict and judgment are contrary to law (R. 28), which was prominently stressed upon the brief and on oral argument. With respect to that assignment, and as reasons for refusing to consider it, the opinion of this court states:

"The last assignment appears not to be based on any ruling by the trial judge and attempts to bring directly to this court the question whether the verdict and judgment are contrary to law because the amount of damages found by the jury is so much less than the amount of the plain-

tiff's claim as to prove conclusively that the claim involved fraud."

[fol. 330] "As to the tenth assignment of error the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent overvaluation by the plaintiff in the proof of loss. Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it."

No question as to the right and duty of this court to consider that assignment of error was raised by appellee, either in his brief or upon his oral argument, and the authorities bearing upon such question consequently were not called to the attention of the court, as of course they would have been if such question had been raised.

We respectfully submit that the court has fallen into error in refusing to consider the assignment of error so referred to, and a rehearing is respectfully prayed for upon that ground, and also upon the grounds stated at pages 11-14, infra.

The function of a bill of exception is to make part of the record matters which otherwise are not a part thereof. A verdict is itself a part of the record, and the question whether or not the verdict supports the judgment is an issue of law which appears upon the record without any exception. Consequently, no exception is necessary in order to present that question to an appellate court upon a writ of error. The authorities to this effect are numerous and uniform.

The general rule that where an error is apparent on the record no exception is necessary to preserve the rights of the party aggrieved, and that such error may be assigned

as ground for reversal although no exception be taken, is stated in

Coughlin v. District of Columbia, 106 U. S. 7, 11;
[fol. 331] Moline Plow Co. v. Webb, 141 U. S. 616, 623;
Nalle v. Oyster, 230 U. S. 165, 176, 177;
F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 447;
Baltimore & Potomac R. R. v. Trustees, 91 U. S. 127, 130;
Ana Maria Co. v. Quinones, 254 U. S. 245, 247;
Worthington v. McGough, 192 Fed. 512, 513 (6 C. C. A.);
City of Wilmington v. Ricaud, 90 Fed. 212, 214 (C. C. A.).

That under that rule the pleadings and verdict and judgment are part of the record without being made so by bill of exception is established by

Denver v. Home Savings Bank, 236 U. S. 101, 103, 104;
Snowden v. Fort Lyon Canal Co., 238 Fed. 495, 497 (8 C. C. A.);
Clinton v. Missouri Pac. Ry., 122 U. S. 469, 474;
Bennett v. Butterworth, 11 How. 669, 676;
Patterson v. Robinson Bros. & Co., 180 Fed. 668, 671 (3 C. C. A.);
East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., 249 Fed. 439, 442 (8 C. C. A.);
Daube v. Philadelphia & R. C. & I. Co., 77 Fed. 713, 714 (7 C. C. A.).

It consequently follows that whether or not a verdict supports the judgment entered thereon is a question of law apparent upon the face of the record and is reviewable without any exception, and the cases so specifically declare.

In Clinton v. Missouri Pac. Ry., supra, the court said (122 U. S. at p. 474):

"As to the proposition that it cannot be reviewed here for want of a bill of exceptions, that is equally untenable. A judgment of a court appealed from is never incorporated into a bill of exceptions. It is always a part of the record

of the case, and, *like the plea and the verdict, it needs no bill of exceptions,* but is simply to be transcribed as a part of the record."

[fol. 332] In Bennett v. Butterworth, supra, the action was to recover property, the jury returned a verdict for a sum of money, and the court entered a judgment for recovery of the property. In reversing such judgment the court said (11 How. at p. 676):

"The judgment is evidently erroneous, and must be reversed. And as these errors are patent upon the record, they are open to revision here, *without any motion in arrest of judgment, or exception taken in the District Court.*"

In Patterson v. Robinson Bros. & Co., supra, the court said (180 Fed. at p. 671):

"It is contended, however, that neither of the two assignments under consideration can be sustained owing to the fact that no exception was taken in the court below to the verdict. It was not necessary to except to it. It was and is part of the record, and an exception cannot be essential where it can add nothing to what appears on the face of the record. F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. *Consequently any infirmities in the judgment arising from the nature and form of the verdict on which it is based can be reached by an assignment of error.*"

In East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., supra, the court said (249 Fed. at p. 442):

"It is assigned as error that the verdict is inconsistent with itself and that the trial court erred in entering judgment thereon. *The question as to whether the verdict supports the judgment is a question of law, which appears on the face of the record without a bill of exceptions.* Such questions may be assigned as ground of reversal, although no exception is taken. Denver v. Holmes Savings Bank, 236 U. S. 101, 35 Supp. Ct. 265, 59 L. Ed. 485; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439; Snowden v. Ft. Lyon Canal Co., 238 Fed. 495, 151 C. C. A. 431 (8th Cir.)."

In World's Columbian Exposition Co. v. Republic of France, 91 Fed. 64 (7 C. C. A., with Mr. Justice Harlan sitting), the court said (pp. 69, 70):

"It is fundamental that a judgment cannot stand unless [fol. 333] the facts of record,—apart from any showing by bill of exceptions,—aided as far as may be by the verdict, will support it. *This rule holds equally where no point of the kind was made before the trial judge, either by demurrer or motion in arrest of judgment.* Slacum v. Pomery, 6 Cranch. 224; United States Bank v. Smith, 11 Wheat. 172; Funk v. Piper, 50 Ill. App. 163; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795. *In entering the judgment the trial judge necessarily rules or assumes that the record itself*—not matters to be presented by bill of exceptions—*contains the showing of fact on which such judgment may be lawfully predicated.* If the record be insufficient, then, in strictness, the error occurs in entering the judgment."

"An assignment of error (section 997, Rev. St. U. S.) is not jurisdictional in the supreme court of the United States or in the federal courts of appeal; hence the statement in the rules to the effect that the court may reverse for an obvious error, even though not assigned. The power of these tribunals to affirm or reverse or modify does not depend upon the presence or absence of any specific assignment of error. Mussina *v.* Cavazos, 6 Wall. 359. This, of course, does not mean that a court of error can review any matter not excepted to where such matter has no footing in the case other than by bill of exceptions. *But matter of record (apart from the bill of exceptions) to which, as is often said, the exception saves itself, is open to the court of review.* In the absence of any assignment calling attention to the point this court is not bound to affirm a judgment which the facts of record, aided by legal intendment, after verdict, fail to support."

"Where there was neither a demurrer nor motion in arrest in the trial court, the *assignment* that the declaration does not show a cause of action, *or any form of words which calls to the attention of the court the proposition that the facts of record upon which the judgment is necessarily predicated are insufficient to support it,* has been held good.

Funk v. Piper, 50 Ill. App. 163; McGregor v. Hubbs, 125 Ind. 487, 25 N. E. 591; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795. The statement that the court erred in entering the judgment plainly means that the record is insufficient in law to warrant such judgment."

[fol. 334] In Webb v. National Bank of Republic, 146 Fed. 717 (8 C. C. A.), the court said (p. 719):

"No objection or exception is required, however, to present to an appellate court the question whether or not the facts found sustain the judgment, because *like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record.*"

In Guaranty Trust Co. v. Koehler, 195 Fed. 669, the same court again said (p. 671):

"No objection or exception is required to present to an appellate court the legal issue whether or not a special finding of facts made by the court upon the trial of an action at law warrants the judgment, because, *like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record.*"

In Insurance Co. v. Boon, 95 U. S. 117, which, like the two cases last cited, had been tried before the court without a jury, the court likewise assimilated the findings in such a case to the verdict of a jury and said (p. 124):

"No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. *They belong to the record as fully as do the verdicts of a jury.*"

So, too, in Allen v. St. Louis Bank, 120 U. S. 20, the court said (p. 30):

"When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has *the same effect as the verdict of a jury;* and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are *sufficient in law*

to support the judgment, may be reviewed on writ of error *without any bill of exceptions.*"

[fol. 335] The authorities thus leave no doubt that no exception was necessary to raise the question which this court has refused to consider.

This court also suggests that the court below did not rule upon the question. The record, however, shows the contrary (and we here use the word "record" in the strict technical sense), for the judgment under review expressly recites that the court below "ordered that judgment in accordance with the verdict of the jury be entered" (R. 25). The court below thus necessarily ruled that the record showed facts upon which the judgment might lawfully be predicated (See World's Columbian Exposition Co. v. Republic of France, supra), and that is the precise ruling which we here seek to review and which this court has refused to consider.

It perhaps is true that appellant could have made in the court below a motion in arrest of judgment or a motion for a new trial, but no such motion was necessary in order to preserve its right of review in this court.

With respect to motions in arrest of judgment, a controlling authority is Slacum v. Pomery, 6 Cranch. 221, in which there appears the following (p. 223):

"Swann, for the plaintiff in error, contended: * * * And although this might have been taken advantage of in the court below, in arrest of judgment, yet it was also a fatal objection upon a writ of error. The record does not show that the plaintiff was entitled to his judgment. 2 Doug. 679.

Youngs, contra.— * * * There was no motion in arrest of judgment. This objection was not taken in the court below.

"Marshall, Ch. J.—There can be no doubt, that anything appearing upon the record, which would have been fatal upon a motion in arrest of judgment, is equally fatal upon a writ of error."

It is undoubtedly because of that principle that motions in arrest of judgment are now rarely made.

It should also be noted that in Slacum v. Pomery, supra, the Supreme Court reversed the judgment and remanded

[fol. 336] the cause with direction that the judgment be arrested—not that the verdict be set aside (p. 224).

With respect to a motion for a new trial, we respectfully inquire: Why should the appellant be required or expected to make such a motion in view of the fact that, according to its position and contention, the verdict already rendered establishes the fact that entitles it to judgment in its favor, viz., the fraudulent exaggeration of plaintiff's claim?

The situation of appellant here is like that of the automobile owner in Pangburn v. Buick Motor Co., 211 N. Y. 228, to which we call special attention because it follows the Federal cases above cited. In that case, which was an action for damages for personal injuries sustained in an automobile collision, the jury found in favor of the employee-driver and against the employer-owner, although the latter's only liability was on the theory of respondeat superior. The court there held that the verdict should be treated as one in favor of the employer-owner because the part which found in favor of the employee-driver necessarily negatived the facts upon which it was sought to hold the employer-owner. It also held that such verdict did not support the judgment which was entered thereon against the employer-owner, and that such question could be reviewed upon an appeal from the judgment. The court recognized the general rule that "on appeal from a judgment in a civil action this court can only consider questions of law, and that those questions must be presented by exceptions" (p. 235), but the court then said (pp. 235, 236):

"But a case may arise where there is no opportunity to take an exception, and such is the present one. As has already been stated, the charge of the trial judge was correct and did not authorize the jury to do any such thing as was by them done, and, therefore, no occasion or opportunity was presented for taking an exception which which would cover their subsequent action. There was no such thing as taking an exception to the verdict, and *while the appellant doubtless had the right to move to set it aside for the reasons herein considered and appeal from an order denying such motion, he naturally would not care to follow up this form of relief if he considered that the verdict had the ef-*
[fol. 337] *fect of exonerating his client and, therefore, might furnish the basis for a judgment in its favor.* Neither of

course could an exception be taken to the judgment which was entered on the verdict, and, therefore, there was no such opportunity to take an exception as would furnish any sound reason for the application of the rule which has been adverted to. Under such conditions we think the rule has no pertinency.

"The situation is that the appellant is injured by *a judgment which has no foundation,* and we think that both on principle and authority an appeal from the judgment is a proper and sufficient method of presenting this objection which is fully disclosed by the record. Such a view is entirely in harmony with the rule established by the court that an appeal from a judgment entered on findings permits the appellant to argue the proposition that the judgment is not supported by the findings, *and it is sustained by what has been written concerning appeals from judgments in cases tried before a jury.* (Wheeler v. Sweet, 137 N. Y. 435, 439, 440; Webb v. National Bank of Republic, 146 Fed. Rep. 717, 719; Bennett v. Butterworth, 11 How. [U. S.] 669, 676; Reade v. Street, 122 N. C. 301; Guaranty Trust Co. v. Koehler, 195 Fed. Rep. 669.)"

If, however, a motion had been made to set aside the verdict and grant a new trial, that would not have changed the situation in this court, for it is settled that the denial of such a motion cannot be made the subject of an exception and is not appealable and cannot be assigned as error.

In Railway Co. v. Heck, 102 U. S. 120, the court said:

"We have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion *cannot be assigned for error here.*"

In Fitzgerald Construction Co. v. Fitzgerald, 137 U. S. 98, the court said (p. 113):

"The motion for a new trial was addressed to the discretion of the Circuit Court and action on such a motion is *not a subject of exception.*"

[fol. 338] In Ayers v. Watson, 137 U. S. 584, the court said (p. 597):

"Before examining the errors assigned in relation to the charge and refusals to charge as requested, the third assign-

ment of error may be disposed of. This was the refusal of the court to grant a new trial. And as to this, we have only to repeat what we have so often endeavored to impress upon counsel, that *error does not lie for granting or refusing a new trial.*"

In Van Stone v. Stillwell & Co., 142 U. S. 128, the court said (p. 134):

"With respect to the fourth error assigned, it is sufficient to say that the overruling of a motion for a new trial in the court below *cannot be assigned for error,* and no authorities need be cited in support of the proposition."

In Holder v. United States, 150 U. S. 91, the court said (p. 92):

"It has also been settled by a long line of decisions of this court that the denial of a motion for new trial cannot be assigned for error. As observed by Mr. Justice Lamar, in Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 134, no authorities need be cited in support of the proposition."

In Wheeler v. United States, 159 U. S. 523, the court said (p. 524):

"Another contention is that the court erred in overruling the motion for a new trial, but such action as has been repeatedly held, is not assignable as error."

There are almost innumerable cases in the various Circuit Courts of Appeals which lay down the same rule.

Indeed, the denial of a motion for a new trial is not even a part of the record on appeal. (Ford Motor Co. v. Hotel Woodward Co., 271 Fed. 625, 630, 2 C. C. A., cert. denied 256 U. S. 698 and 259 U. S. 588.)

[fol. 339] The authorities thus establish

(a) that the question whether the verdict supports the judgment appears upon the face of the record and consequently is reviewable without an exception;

(b) that the court below did in fact rule upon the question and its ruling appears upon the face of the record because the judgment itself (R. 24, 25) recites that that court "ordered that judgment in accordance with the verdict of the jury be entered";

(c) that a motion to set aside the verdict and grant a new trial was unnecessary, and would not have constituted ground of exception or appeal even if made; and

(d) that even if a motion in arrest of judgment might have been made below, such motion was not necessary in order to present the question upon appeal.

Wherefore, it is respectfully submitted that the court erred in refusing to consider the question, and it is respectfully prayed that a re-hearing be granted and that issuance of the mandate be meanwhile stayed.

Upon the merits of the question of avoidance by overvaluation, we desire to add Riley v. Aetna Ins. Co., 92 S. E. 417, L. R. A. 1917E 983 (W. Va.), and Hiller Co. v. Insurance Co. of N. A., 125 La. 938, 52 So. 104, as two additional cases in which the jury found for the insured for about half the amount claimed and in which it was held that the judgment entered upon such verdict should be reversed because of fraudulent overvaluation.

The court is respectfully asked, also, to reconsider its rulings with respect to

1. The refusal to direct a verdict because of non-compliance with the Iron Safe Clause.

2. The refusal to charge that there is no evidence of "cost of labor" or of the value of goods claimed to have been sold to the plaintiff by its president.

[fol. 340] It is undisputed, and in fact proclaimed, that a part of the plaintiff's business "consisted of manufacturing goods that were sent to the corporation by dealers in the United States" (R. 56), that a part of the goods so sent for manufacture was sent out "to different parts of the Island to be manufactured" (R. 45), and that on the night of the fire there was merchandise on hand that belonged to others (R. 118). Indeed, working on goods of other people was the plaintiff's sole business until a very short time before the fire, when it started "a new class of business, manufacturing for our own account" (R. 113). It also is undisputed—in fact plain to the naked eye—that the inventory produced by the plaintiff does not show anything except goods claimed to have been owned by the plaintiff, as distinguished from goods of other persons which had

been sent to it for manufacture (Compare inventory at R. 296-299 with proof of loss at R. 254-259).* Those facts being undisputed, it became a question of law for the court as to whether the Iron Safe Clause was complied with, and it was error to leave that question to the jury (Home Ins. Co. v. Williams, 237 Fed. 171, 175-177). The policy covers merchandise "of the assured, or held in trust or on commission, or consignment, or on joint account with others" (R. 244), and the Iron Safe Clause requires the keeping of "a complete itemized inventory of stock on hand" (R. 246). Can it be possible that the court really means to hold that an inventory which does not show the merchandise held on hand for others as well as merchandise owned is a compliance with the Iron Safe Clause, or that a jury may be permitted to so find? This question was squarely raised by the motion for a directed verdict (R. 14) and an exception was taken to the denial of that motion (R. 13). It was also argued in appellant's brief at page 21 thereof.

With respect to the refusal to charge that there is no evidence of cost of labor, this court, we submit with great respect, has fallen into error as to what the record shows. It states in its opinion that "the expert accountant called [fol. 341] by the plaintiff testified that this item appeared on its books, and he referred the item to certain vouchers which constituted part of the plaintiff's records", also that the sworn proof of loss which was put in evidence contained the item in question, and that Mr. Soler was examined and cross-examined with reference to the proof of claim and the various items in it "including this one". The fact is, however, that the expert accountant called by the plaintiff testified to an item of "goods in process $2524" (R. 37), which of course is a totally different thing from "cost of labor". Furthermore, the so-called "voucher" was excluded upon defendant's objection that it was not a voucher and was merely marked for identification as a document which "was used by the witness for the purpose of his examination" (R. 38-40) and appellant's counsel expressly conceded that it was incompetent unless connected (R. 39), and it never

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*Rivera Soler testified: "On the night of the fire there was * * * more silk in this place which did not belong to me * * *; they belonged to somebody else; my company is not claiming for this material that belonged to somebody else from the defendant company" (R. 118).

was connected. The fact also is that, although the proof of loss contains an item "Labor on good- in process $2524.-50" (R. 255), Rivera Soler distinctly testified that "in that item there is included *only the price that we collected from the people in New York;* that is to say, if my contract price was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozen of those on hand, that $7.50 was insured" (R. 112). He also testified (R. 118):

"My company is not claiming for this material that belonged to somebody else from the defendant company, we have calculated what we have paid for labor on that; *not for labor, but what we collect or charge for labor and for the loss of our silk; I am not claiming from the defendant company the money that I have paid to the employees for working this material;* I calculate that when a lot of material is finished, we are unable to charge only what we have paid for the work, because that is material that is already finished and ready for shipment, and all the overheads are incurred upon those goods, and if for a dozen garments we are paid $24 to make them, I in my calculations put there $24; it may be that I have paid $2 for that, but it is worth $24 to me; *I include the cost of labor, the overhead expenses and my profit, the article being finished and ready for shipment at the time of the fire.*"

Rivera Soler's own testimony thus makes it plain and indisputable that the item claimed as cost of labor was not [fol. 342] cost of labor. The facts shown in the record are the exact antitheses of what the court states in its opinion.

When the defendant requested a charge that there was no evidence from which the cost of labor claimed could be determined (R. 22, 314), that was a challenge which called upon the plaintiff to point to some evidence from which the cost could be obtained, and as no such evidence was pointed out (the Trial Judge himself expressly stating that he did not recall any such evidence—R. 314, 315), the defendant was entitled to the charge. For a court, when such a request is made, merely to say that perhaps the jury can find some such evidence, or that such evidence "may have appeared on slips and other informal records which were put in evidence", is, we submit, an abdication of judicial function, for it is for the court to say whether or not there is any evidence, and if the court can recall more and opposing

counsel does not point out any, then the requested charge should be given.

As to the requested charge that there was no evidence from which the value of goods alleged to have been sold to the plaintiff by its president, this court says "It was a much controverted item as to which a good deal of evidence was introduced". There was of course a good deal of evidence with respect to the fact of purchase, but there again we respectfully submit that the record may be searched in vain for any evidence with respect to value.

We beg respectfully to add that in the event that this court adheres to the decision it has announced our instructions are to apply for a writ of certiorari, and in order that the time for such application will not be running against appellant while this application is being considered, we respectfully request that the judgment entered herein on May 25, 1935, be vacated and set aside now.

Respectfully submitted, Henri Brown, Carroll G. Walter, Counsel for Appellant.

I hereby certify that in my opinion the foregoing petition is well founded and that it is not presented for the purpose of delay.

Carroll G. Walter.

June 12, 1935.

[fol. 343] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

[Title omitted]

Before Bingham, Morton and Morris, JJ.

OPINION OF THE COURT ON PETITION FOR REHEARING—January 7, 1936

BINGHAM, J.:

Since handing down our opinion in this case on May 25, 1935, the defendant has filed a motion for rehearing, a rehearing has been granted as to the 10th assignment of error and the assignments relating to the refusal of the court below to direct a verdict for the defendant, and the parties have been heard.

Under the 10th assignment it is contended that the verdict and judgment are contrary to law, that the amount of the loss fixed by the verdict is so inconsistent with the proof of loss and the provisions of the policy, both of which [fol. 344] are made a part of the pleadings, as to show that the plaintiff's sworn proof of loss was fraudulent as a matter of law.

When the case was previously before us we declined to consider this question, apparently on the ground that after the verdict no motion, ruling, or exception relating to the matter was had or taken at the trial term. On reconsideration of the question we are of the opinion that no motion or exception was necessary; that the error, if any, appeared upon the face of the record proper; and that a writ of error and an assignment of error relating to the matter are all that are required to preserve the question and authorize us to entertain it. Bills of exception are necessary to preserve exceptions to rulings made in the progress of the trial, but errors appearing on the face of the record proper need not be so preserved. In the court below the defendant could have made a motion in arrest of judgment, but no such motion was necessary.

This question was before the court in Slacum v. Pomery, 6 Cranch, 221, where defendant contended that, although such a question "might have been taken advantage of in the court below, in arrest of judgment, yet it was also a fatal objection upon a writ of error," for "the record [record proper] does not show that the plaintiff was entitled to his judgment." Counsel for the plaintiff, however, contended that a motion in arrest of judgment was necessary. But Chief Justice Marshall, in speaking for the court, said:

"There can be no doubt, that anything appearing upon the record, which would have been fatal upon a motion in arrest of judgment, is equally fatal upon a writ of error."

The order in that case reversed the judgment and remanded the cause "with direction that the judgment be arrested"—that is, that no judgment be entered on the verdict.

In considering the question raised by the 10th assignment the evidence introduced at the trial and brought here by bill of exceptions is not to be considered, for that is no part of the record proper. The inquiry is confined to such

matters as appear in the record proper. That record in this case includes the complaint, proof of loss and the [fol. 345] policy (which are included in the complaint), the verdict and judgment.

In the complaint it is alleged that, on the 9th day of February, 1932, the defendant issued to the plaintiff a policy of fire insurance, insuring its goods and property, for one year from the date of the policy, against loss or damage caused by fire in the sum of $30,000; that "the description of the property insured, the location thereof and the amounts covered by the said policy of insurance" were as follows:

"'Thirty thousand dollars': For the term of one year, distributed as follows:

$15,000.00	On stock of merchandise, unembroidered, embroidered, and in the process of being embroidered, or for repairs, and *on cost of labor performed thereon* [Italics supplied], including all materials, ingredients and supplies used in the manufacturing and repairing the same, including boxes, samples and packages, the property of the assured, or held in trust or on commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered all while contained in the two story concrete building with zinc roof, situated at Pumerada St. No. 4, block No. 657 of the suburb of Santurce, San Juan, Puerto Rico.
$12,000.00	On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments, and any other material used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.
$3,000.00	On furniture, fixtures including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.
$30,000.00	Total."

The 10th condition of the policy provided that "on the happening of any loss or damage the Insured shall forth- [fol. 346] with give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company *a claim in writing* for the loss and damage, etc." And in condition 12 it provided:

"*If the claim be in any respect fraudulent,* or if *any false declaration be made* or *used in support thereof,* or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, *all benefit under this policy shall be forfeited.*" (Italics supplied.)

Under the first item of the policy covering the property there specified in the sum of $15,000.00 the plaintiff claimed in its proof of loss the destruction of property valued at $17,345.21. Under the second item of the policy covering the property there specified in the sum of $12,000.00, it claimed in its proof of loss the destruction of property valued at $14,835.10. And under the third item insuring property for $3,000, it claimed in its proof of loss $3,745.75 —making a total valuation of property claimed to have been destroyed of $35,926.06, the total insurance being $30,000.

The verdict of the jury was for $17,000, and the judgment entered was for that amount. It thus appears in the record proper that the total amount of insurance on the property was $30,000; that the total value of the property insured, as claimed and sworn to in the proof of loss, was $35,926.06, and that the verdict and judgment were for $17,000, or something less than half the total value of the property sworn to in the proof of loss upon which the plaintiff sought to have the company pay it $30,000.

The defendant contends that the great disparity between what the jury awarded ($17,000) and what the plaintiff

would have been entitled to ($30,000) had it had property on hand at the time of the fire of the value of $35,926.06, as claimed and sworn to in the proof of loss, necessarily [fol. 347] shows that the proof of loss contained fraudulent statements as to the value and character of the property on hand and insured.

It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000 shows on its face and as a matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000.

A similar question arises under the motion for a directed verdict based upon the evidence as to the cost of labor. The cost of labor was one of the elements insured under the policy. It was set down in the proof of loss as $2,524.50.

Under the motion for a directed verdict the evidence introduced at the trial and included in the bill of exceptions is open for consideration. There is no evidence in the case and counsel for the plaintiff has pointed out none, though requested to do so, showing that the cost of labor "on goods in process" was $2,524.50, as stated in the sworn proof of loss. The only evidence in the record relating to that subject is that given by Soler himself (president of the plaintiff company) where he states that the sum of $2,524.50 was the contract price which the company was to receive for manufacturing the goods of others. If the statement in the proof of loss, to which Soler made oath, did not represent the cost of labor, but was the contract price which the plaintiff was to receive from others for whom goods were being manufactured, no other conclusion can reasonably be drawn than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that the plaintiff was not entitled to and was fraudulent. And, under Condition 12 of the policy, deprived the plaintiff of its benefits. Soler was the president of the plaintiff company and made oath to the proof of loss.

We had a similar question before us in Cuetara Hermanos v. Royal Exchange Assurance Co., 23 Fed. (2d) 270; [fol. 348] certiorari denied, 277 U. S. 590. Article 13 of the

policy in that case read the same as Condition 12 of this one. There the value of the property destroyed was largely overstated in the proof of loss and we sustained a directed verdict for the defendant on the ground that the claim made either in the proof of loss or in evidence at the trial was false and so excessive from the standpoint of the value and amount of property actually destroyed that the District Court did not err in directing a verdict for the defendant.

Our order of May 25, 1935, affirming the judgment of the District Court of Puerto Rico is vacated; the judgment of the District Court of Puerto Rico of May 31, 1934, is vacated, and the case is remanded to that court with directions to enter an order in arrest of judgment, with costs to the appellant in both courts.

MORTON, J. (dissenting):

My brethren hold first that fraud on the part of the plaintiff conclusively appears on the face of the record without considering any evidence, and second that fraud on the part of the plaintiff with respect to a certain item in the proof of loss was so conclusively established by the evidence that the defendant was entitled to a directed verdict. On neither point am I able to agree.

As to the first point, passing by immaterial matters, the record before us consists of the complaint with the papers annexed to it, i. e., the policy and the proofs of loss, the answer which sets up many defenses including fraud, and the verdict which was for just about one half the amount claimed in the proofs of loss. Looking at these papers and nothing else, my brethren hold that fraud on the part of the plaintiff is conclusively established by the discrepancy between the amount of the claim and the amount of the verdict. In the opinion they say, "the evidence introduced at the trial and brought here by bill of exception is not to be considered, for that is no part of the record paper." No precedent for the decision is referred to and none has come to my attention.

Fraud as used in this policy means conscious dishonesty. It is a matter of fact. The majority opinion holds, in effect, that, when the amount claimed in a proof of loss under a [fol. 349] fire insurance policy is cut down one-half by the

jury on the trial of the case, fraud is thereby conclusively established and the proofs cannot under any circumstances have been honestly made. It seems to me, on the contrary, very easy to conceive circumstances under which the amount honestly claimed in a proof of loss might be cut down one-half by a jury. On questions of valuation, and sometimes also on questions of ownership for insurance purposes, there is wide room for honest mistakes and honest difference of opinion, If we assume, as I think we must, that the jury were properly instructed that fraudulent statements by the plaintiff in the proof of loss would entitle the defendant to a verdict, then the verdict for the plaintiff necessarily involved a finding on the evidence presented that the proofs of loss were not fraudulent. This finding is set aside without considering the evidence.

If the verdict for the plaintiff be regarded as inconsistent with the finding on damages, that point should, I think have been brought to the attention of the trial judge on a motion to set the verdict aside, which was not done. It cannot be presented indirectly in this way. How can we say that the error in the verdict,—if there was one,—did not consist in awarding inadequate damages on an honest claim, rather than awarding any damages on a dishonest one? Such questions necessarily involve an examination of the evidence. Again the instructions to the jury as to the law under which damages should be assessed,—which are not before us,—may have been very different from what the plaintiff had in good faith supposed the law to be. Such a mistake is not fraud. For these reasons and others which might be mentioned I do not think that the discrepancy between the claim and the verdict conclusively proved that the claim was fraudulent.

As to the second point, viz., the item of $2,524.50 for "goods in process": The evidence on this is before us and my brethren hold that fraud by the plaintiff with respect to it was established as a matter of law, so that the defendant was entitled to a directed verdict. The opinion states, "The only evidence in the record relating to that subject (the item in question) is that given by Soler himself," etc. This would seem to be a clear mistake. The [fol. 350] plaintiff's expert accountant (Gorbea) refers explicitly to this item as being in the plaintiff's books, "According to what the books show the plaintiff has". • • •

(various items) * * * "goods in process $2,524." After discussing other matters he continued, "Now goods in process $2,534. Here is a voucher which is—." Objection was made by the defendant to the introduction of the vouchers. The witness (Gorbea) continued, "I did find an entry in the inventory book corresponding to that voucher," etc, etc. During a rather lengthy discussion, plaintiff's counsel said there were "hundreds, perhaps thousands, (of vouchers) which would encumber the record unnecessarily." Eventually the vouchers were not admitted. The same witness testified that the plaintiff's books and vouchers to which he had referred "are a complete record of the business transacted by that company (the plaintiff)." The $2,524.50 item was repeatedly referred to and discussed. Soler's testimony about this item was in part as follows:

"As to the item of $2,524.50 for labor and goods in process I would have to get the assistance of my bookkeeper; I really never participated in the work of the accounting department; if he explains to me, * * *; labor and goods in process means work that is not finished; unfinished work; sometimes one goes to the machine department and finds a piece that is finished, but still has to be embroidered, but others that are embroidered but not sewn together yet. We did work for firms outside of Puerto Rico; the American houses supplied us with the material and we supplied the labor and thread for sewing and embroidering; we got the material from the United States and the company supplied the labor and thread and other necessaries to complete the work; then I made out my invoice and took it to the bank, and they gave me credit for it and discounted it."

* * * * * * *

"the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; no, in that item there is included only the price that we collected from the people in New York; that is to say, if my contract price was 75 cents a dozen for creepers, a cer- [fol. 351] tain class of creepers, and I had ten dozen of those on hand, that $7.50 was insured."

This shows the charges which went into the item. They are of a kind as to which honest mistake is easily conceivable. I suppose that the last statement above quoted is the one on which my brethren rely as conclusively establishing fraud on Soler's part, in the face of the jury's finding to the contrary. There is no evidence that Soler was making any profit on this work, or did not take it at cost. That possibility ought to be eliminated before it is held that his statement above quoted affords conclusive evidence of fraud by him. His testimony by no means shows, as it appears to me, that he may not have acted under honest mistake as to his rights. Apparently, this item was fully supported by the vouchers which were not put in. Conclusive fraud with respect to it does not seem to me to have been shown.

[fol. 352] On April 16, 1935, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—May 25, 1935

This cause came on to be heard April 16, 1935, upon the transcript of record of the District Court of the United States for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, May 25, 1935, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed with costs.

By the Court.

Arthur I. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRIES

Thereafter, to wit, on June 14, 1935, a petition for rehearing (page 329) was filed by appellant, which was granted on August 2, 1935.

Thereafter, to wit, on October 15, 1935, this case came on to be heard on reargument by the court, Honorable George H. Bingham and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER VACATING JUDGMENT—January 7, 1936

Our order of May 25, 1935, affirming the judgment of the District Court of Puerto Rico of May 31, 1934, is vacated; the judgment of the District Court of Puerto Rico of May 31, 1934, is vacated, and the case is remanded to that court [fol. 353] with directions to enter an order in arrest of judgment, with costs to the appellant in both courts.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on February 8, 1936, mandate issued to the District Court for Puerto Rico.

Clerk's certificate to foregoing record omitted in printing.

[fol. 354] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of thirty (30) days from April 6th.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of March, 1936.

[Endorsed:] File No. —. Supreme Court of the United States, October Term, 193-. Term No. 928. Jose Rivera

Soler & Co., Petitioner, vs. United Firemen's Ins. Co. Motion for and order extending time within which to apply for writ of certiorari. Filed Mar. 12, 1936.

[fol. 355] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 25, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,482. U. S. Circuit Court of Appeals, First Circuit. Term No. 31. Jose Rivera Soler & Co., Inc., petitioner, vs. The United Firemen's Insurance Company of Philadelphia. Petition for a writ of certiorari and exhibit thereto. Filed April 15, 1936. Term No. 31, O. T., 1936.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND SUPPORTING BRIEF.

FRANCIS H. DEXTER,
Attorney for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Questions presented	2
Grounds for appeal to the discretion of this Court	4
Statement	4
Property insured as described in policy	4
Answer—clause of policy relied on for defense	6
Respondent conceded that no misrepresentation made prior to issuance of policy	7
Conflicting evidence as to overvaluation of property insured	8
Evidence in support of claim for cost of labor on goods in process	9
Clause of policy covering labor on goods in process	9
Finding of Court of Appeals on this item in its first decision	9
Defendant's instruction on this item did not submit question of fraud, but only insufficiency of evidence to support it	12
The verdict rendered gave no implication as to whether or not this item was allowed	12
The motion for a directed verdict	12
Defendant's requests for instructions on question of fraud, generally	12
No exceptions were taken to the giving of plaintiff's requested instructions, or to the modification of defendant's instructions on the question of fraud	15
Verdict	16
No motion for new trial or in arrest of judgment was filed by defendant	16
Judgment	16
Assignment of error of appellant involved in this petition	16
Decisions and judgments of the Circuit Court of Appeals	16
A. The first decision and judgment of May 25, 1935, unanimously affirmed the judgment of the District Court	16
B. The decision and judgment of January 7, 1936, upon rehearing sought to be reviewed	18
Portions of the dissenting opinion of Judge Morton	23
Petitioner's contentions	24
Reasons for granting the writ	25
Brief in support of petition	27
Opinions below	27
Jurisdiction	27

Page

Specification of errors (petitioner's) 27
Argument and review of cases in conflict with the decision and judgment complained of 28
Conclusion 36

TABLE OF CASES CITED.

A.

Atlas Insurance Co. v. Hurst, 11 F. (2d) 250, C. C. A., 8th Circuit ... 33
American Central Insurance Co. v. Harmon Knitting Mills 39 F. (2d) 21, (C. C. A., 7th Circuit) 35

C.

Claflin v. Insurance Company, 110 U. S. 81 29
Connecticut Fire Insurance Co. v. Hurst, 11 F. (2d) 254, (C. C. A. 8th Circuit) 34
Camden Fire Insurance Co. v. Penick, 2 F. (2d) 964 (C. C. A., 5th Circuit) 32
Cuétara v. Royal Exchange Insurance Co., 23 F. (2d) 270 35
Columbian Insurance Co. v. Modern Laundry, 277 F. 355 (C. C. A., 8th Circuit) 36

G.

Great American Ins. Co. v. Roney & Berger Co., 42 F. (2d) 816 (C. C. A., 8rd Circuit) 29, 31
Globe & Rutgers Fire Insurance Co. v. Stallard, 68 F. (2d) 237 (C. C. A., 4th Circuit) 35

M.

Mack v. Lancashire Insurance Company, 4 Fed. Rep. 59 30

N.

National Fire Insurance Co. v. Renier, 22 F. (2d) 671 (C. C. A., 7th Circuit) 34

R.

Republic Fire Insurance Co. v. Welde, 14 Wallace 375 33

S.

Spring Garden Insurance Co. v. Amusement Syndicate Co., 178 F. 519 (C. C. A., 8th Circuit) 31
Slacum v. Pomeroy, 6 Cranch 221 36

STATUTES CITED.

Judicial Code, Sec. 240(a); U. S. Code, Sec. 347(a), Title 28 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 928

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, José Rivera Soler & Co., Inc., presents its petition for a writ of certiorari to review the final decision and judgment of the Circuit Court of Appeals for the First Circuit, January 7th, 1936, in the above case in which petitioner was appellee and respondent was appellant.

Upon a petition for a rehearing by appellant the Circuit Court of Appeals vacated its unanimous decision and

judgment of May 25, 1935, affirming the judgment of the District Court of the United States for Puerto Rico, of May 31, 1934, and entered judgment vacating such judgment of the lower court in favor of petitioner and remanding the case to the District Court with directions to enter an order in arrest of judgment. The first decision and judgment is reported in 77 F. (2d) 891, and in the additional record hereto attached at page 323.

The first decision was by Judge Morton; the later decision was by Judge Bingham—Judge Morton dissenting. It is not reported. It appears in the additional record, page 343 attached hereto.

One of the grounds relied on by the majority in the second opinion is entirely novel—without any precedent so far as we have been able to discover.

It inaugurates a new rule of law, which if allowed to stand will constitute a revolutionary conflict with judicial precedent.

The other ground relied on rests on what must be considered as an incomprehensible oversight by the majority of the court as to the facts in the record, to the great prejudice of petitioner: Although a basic misappreciation of fact in the prevailing opinion is demonstrable by reference to the printed record—and attention was called to it in the dissenting opinion—the error which is fundamental to the view taken by the majority was adhered to.

It is respectfully submitted that under such circumstances the petitioner is entitled to come to this Court for relief. A more detailed presentation of the matter follows.

Questions Presented.

(A) In a suit in a District Court of the United States to recover on an insurance policy for total loss of property insured against fire, a defense was made of false and fraud-

ulent proofs of loss and false swearing upon the trial, which issue was submitted to the jury upon appropriate instructions given at the request of defendant, that if they found there was a false proof of loss, upon the conflicting evidence in the case, the policy was forfeited and plaintiff could not recover. The jury found for the plaintiff, rendering a verdict for approximately one-half of the claim. Did such verdict and the judgment entered thereon standing alone, nothing else being considered, establish on the record fraud as a matter of law which justified the Circuit Court of Appeals upon such alleged error assigned by the appellant insurance company, to vacate the judgment of the District Court and to remand the case with directions to arrest such judgment?

(B) In such a case as above stated, did the Circuit Court of Appeals err in declaring the law to be that "the verdict should have been either for nothing or in the neighborhood of $30,000", the full amount of the policy—the jury having awarded the sum of $17,000, and the proofs of loss having been $35,926.06?

(C) The Record on Appeal from the District Court disclosed considerable evidence offered by Petitioner and admitted in support of an item of $2,524.50 for "labor on goods in process", covered by the first item in the policy of described merchandise, etc., insured for $15,000, which fact was called to the attention of the majority members of the court by Judge Morton in his dissenting opinion. Was it not serious error which influenced and determined the decision, to the prejudice of petitioner, for the majority to hold that there was no such evidence—thus relying upon a mistaken premise to reach the conclusion that the alleged fraud of petitioner in this connection operated as a matter of law to forfeit the policy absolutely?

(D) Whether upon the overruling of a motion for a directed verdict and the presentation by respondent of requests for instructions submitting to the jury the question of fact of wilful and intentional false statements in connection with the proofs of loss; and not having taken exceptions to the modification by the court of such requested instructions, which were given as modified; and not having taken exception to the giving of similar instruction for petitioner; and not having filed a motion for a new trial or in arrest of judgment after the verdict rendered; the Circuit Court of Appeals erred in vacating the judgment of the District Court and ordering an arrest of judgment on the verdict obtained by petitioner.

Grounds for Appeal to the Discretion of This Court to Grant the Petition.

It is believed by counsel for petitioner that Questions A and B present a clear case of conflict with the decisions of other Circuit Courts of Appeals and with the weight of authority on the same matter; that Question C must necessarily be considered in connection with Questions A and B; and that Question D presents a question of procedure which departed from the accepted and usual course of judicial proceedings.

Statement.

The complaint filed in the District Court (page 1, Record on Appeal) alleged the issuance by defendant to plaintiff of a policy of insurance against loss by fire for the amount of $30,000, distributed as follows (pp. 2 and 3, Record on Appeal):

"THIRTY THOUSAND DOLLARS: For the term of one year, distributed as follows:

$15,000.00 On stock of merchandise, unembroidered, embroidered, and in the process of being embroidered, or for repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing and repairing the same, including boxes, samples and packages, the property of the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered all while contained in the two-story concrete building with zinc roof, situated at Pumerada St. No. 4, block No. 657 of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00 On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments, and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$3,000.00 On furniture, fixtures including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00 Total."

The complaint alleged the occurrence of a fire which destroyed all the merchandise and machinery, as above described, and the giving of due notice and a sworn proof of loss amounting to a total sum of $35,926.06.

The answer set up several defenses, including that of false and fraudulent sworn claim or proof of loss consisting of the over-valuation of the property insured, by reason of which it was claimed that the policy was forfeited.

This is the only defense which needs be considered in connection with the decision and judgment of the Circuit Court of Appeals sought to be reviewed.

This defense, as it appears in paragraph VI (a) of the answer (page 7, Record on Appeal), is as follows:

> "VI. For defenses the defendant alleges:
>
> (a) That the policy of insurance mentioned in the second amended complaint was issued by defendant and accepted by plaintiff subject to the following condition:
>
> '12. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under his policy; or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or if the Insured or anyone acting on his behalf shall hinder or obstruct the Company in doing any of the acts referred to in Condition 11; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.'
>
> That in accordance with the provisions of said condition plaintiff has no right to indemnity under the

policy to which this case refers because on or about the 23d of March, 1932, plaintiff filed with defendant its proof of loss under oath claiming indemnity from defendant in the total sum of $30,000 and stating under oath that its property destroyed or affected or damaged by the fire mentioned herein had a value on the date of said fire of $35,926.01 when the truth is that the property located in the building damaged by said fire did not have a value in excess of the sum of $5,000.

Defendant alleges on information and belief that when plaintiff prepared, swore to and filed with defendant the above mentioned proof of claim it knew that the real value of all the property affected by said fire did not exceed the sum of $5,000 and that plaintiff wilfully and voluntarily and in bad faith, and with the sole purpose and intent of defrauding defendant, stated in said proof that the value of said property was $35,926.01 and claimed from defendant the sum of $30,000."

It was conceded upon the trial by attorney for respondent that there was no misrepresentation by petitioner prior to the issuance of the policy as to property insured and value thereof ("amount").

At the conclusion of the case attorney for respondent, and the court, made the following statements (Record on Appeal, page 316):

"Mr. Brown: With that modification, that is satisfactory. I think it was the sixth instruction asked by the plaintiff which recites the testimony of a witness Solo as to conversations as to what Saldana did at the premises prior to the insurance, the charge being that the fact that Saldana was there and saw the premises might be considered by the jury in connnection with any charge of misrepresentation as to amount. That is excepted to because there is no issue of misrepresentation in this case. There is no charge that prior to the issuance of the policy the plaintiff made representations that were acted upon.

"The Court: With that statement, I think that request goes out of the case. I had understood that there was a contention that plaintiff had misrepresented the goods on hand at the time the policy was issued, as well as the goods on hand at the time of the fire. That being the case, I will instruct you, gentlemen of the jury, to disregard that request because it can only apply to misrepresentation made at the time the policy of insurance was entered into, and since there was no such misrepresentation the charge does not apply."

There was evidence in support and denial of the alleged over valuation of property destroyed (p. 325, Additional Record).

"The plaintiff offered the evidence of several witnesses, including an expert accountant to the effect that its books and accounts were of such character as to afford a reasonably complete picture of its business activities, that they were honestly made and kept as required by the policy, and that the proofs of loss conformed to the books and were honest. While the defendant introduced a good deal of evidence to the contrary through witnesses to testify that the books and records were incomplete and insufficient, and not properly kept, and showed clear indications of having been fabricated, the questions were plainly for the jury to determine. These assignments of errors cannot be sustained. Nor can it be said that the evidence, as a whole so clearly established fraud on the part of the plaintiff that the defendant was entitled to a directed verdict on that ground."

(Opinion of the court in its original decision of May 25, 1935, 77 F. (2d) 891).

An important point is here submitted to the attention of the Court in connection with paragraph (C) of the Questions Presented relating to that part of the decision and judgment sought to be reviewed which found that there

was no evidence in support of petitioner's claim for $2,524.50 for "labor on goods in process," which finding obviously was the controlling factor in inducing the majority of the court to render its decision.

It is respectfully submitted that the majority of the court erred in finding that there was no evidence in support of this claim.

The Record on Appeal contains substantial evidence on this question, and Justice Morton in his dissenting opinion pointed it out, in part.

In support of its claim for $2,524.50 for cost of labor and materials petitioner introduced the testimony of one E. Gorbea (Record on Appeal, page 37), of José Rivera Soler, president of the company (Record on Appeal, page 97), and of the bookkeeper Rafael Wolf (Record on Appeal, page 64) where the witness refers to the item as $2,524.74.

The policy of insurance (Record on Appeal, page 2), in its first item describing merchandise and etc. insured, covers

> "stock of merchandise in the process of being embroidered, of all repairs, and on cost of labor performed thereon, including all materials, ingredients and supplies used in the manufacturing and repairing the same, etc."

Justice Morton in his dissenting opinion (Additional Record, p. 349—bottom of page) found:

> "As to the second point, viz., the item of $2,524.50 for "goods in process": The evidence on this is before us and my brethern hold that fraud by the plaintiff with respect to it was established as a matter of law, so that the defendant was entitled to a directed verdict. The opinion states, 'The only evidence in the record relating to that subject (the item in question) is that given by Soler himself,' etc. This would seem to be a clear mistake. The plaintiff's expert account-

ant (Gorbea) refers explicitly to this item as being in the plaintiff's books, 'According to what the books show the plaintiff has' • • • (various items) • • • 'goods in process $2,524.' After discussing other matters he continued, 'Now goods in process $2,534. Here is a voucher which is——.' Objection was made by the defendant to the introduction of the vouchers. The witness (Gorbea) continued, 'I did find an entry in the inventory book corresponding to that voucher,' etc., etc. During a rather lengthy discussion, plaintiff's counsel said there were 'hundreds, perhaps thousands, (of vouchers) which would encumber the record unnecessarily.' Eventually the vouchers were not admitted. The same witness testified that the plaintiff's books and vouchers to which he had referred 'are a complete record of the business transacted by that company (the plaintiff).' The $2,524.50 item was repeatedly referred to and discussed. Soler's testimony about this item was in part as follows:

'As to the item of $2,524.50 for labor and goods in process I would have to get the assistance of my bookkeeper; I really never participated in the work of the accounting department; if he explains to me, • • •; labor and goods in process means work that is not finished; unfinished work; sometimes one goes to the machine department and finds a piece that is finished, but still has to be embroidered, but others that are embroidered but not sewn together yet. We did work for firms outside of Puerto Rico; the American houses supplied us with the material and we supplied the labor and thread for sewing and embroidering; we got the material from the United States and the company supplied the labor and thread and other necessaries to complete the work; then I made out my invoice and took it to the bank, and they gave me credit for it and discounted it.'

• • • • • • •

(Page 350:)

'the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; no, in that item there is included only the price that we collected from the people in New York; that is to say, if my contract price was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozen of those on hand, that $7.50 was insured.'

(Page 350:)

This shows the charges which went into the item. They are of a kind as to which honest mistake is easily conceivable. I suppose that the last statement above quoted is the one on which my brethern rely as conclusively establishing fraud on Soler's part, in the face of the jury's finding to the contrary. There is no evidence that Soler was making any profit on this work, or did not take it at cost. That possibility ought to be eliminated before it is held that his statement above quoted affords conclusive evidence of fraud by him. His testimony by no means shows, as it appears to me, that he may not have acted under honest mistake as to his rights. Apparently, this item was fully supported by the vouchers which were not put in. Conclusive fraud with respect to it does not seem to me to have been shown."

In its request for instructions to the jury respondent did not present the question of fraud with respect to this particular item. It merely questioned the sufficiency of the evidence introduced by petitioner to substantiate it.

Respondent's requested instruction number 4 (Record on Appeal, page 22) was as follows:

"4. You are instructed that there is no evidence from which the cost of labor claimed in the complaint

and in the proof of claim, in the amount of $2,524.50, can be determined and that as to so much of the said claim you should find for the defendant."

The court gave this instruction with the following modification (Record on Appeal, pages 314-315):

> "Now I charge you that, with this modification: unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence—I do not recall it, but if you find it from the record you can find only for such amount as the plaintiff actually paid for labor."

The verdict rendered gives no implication as to whether or not this item was allowed.

The motion for a directed verdict.

At the close of the case respondent presented a motion for a directed verdict (page 15, Record on Appeal). It was overruled, with exception taken by respondent (Record on Appeal, page 13).

The only part of this motion which is material to be referred to in this petition, in view of the decision and judgment complained of, is that contained in its paragraph III, referring to alleged "fraudulent claim and false declarations" (page 15, Record on Appeal) in connection with the proofs of loss, books and claim of petitioner.

After the court overruled this motion respondent presented requests for instructions which left to the jury to find as a matter of fact if the proofs of loss or claim of petitioner had been wilfully and intentionally made. These instructions were given.

See Defendant's Requests for Instructions 1, 2 and 3 (pages 20 to 22, Record on Appeal).

> "The defendant insurance company requests that the court give the following instructions to the jury:

1. You are instructed that the policy of insurance, the subject of this litigation, contains a condition which reads in part as follows:

'If the claim made by the insured (in this case by J. Rivera Soler as president of J. Rivera Soler & Co., Inc.) be in any respect fraudulent, or if any false declaration be made or used in support thereof, or any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy—all benefit under this policy shall be forfeited.'

Such a condition is fair, valid and enforceable and you should keep the words thereof clearly in mind.

This condition required the insured to make honest and truthful representations and statements as to the property affected by the fire and as to the value of the said property at the time of the fire. By the terms of the policy any false and fraudulent statements or representations regarding the value of said property render the policy void.

(In margin:) Good faith in making statements will allow latitude in estimating value.

I charge that if you find that any of the values specified in the proof of loss furnished by the plaintiff to the defendant company were too high or exaggerated, and that the plaintiff caused or permitted the furnishing of such a claim for amounts greatly in excess of the amounts that the officers of the plaintiff corporation knew that such articles were worth with the intention and expectation of getting a greater amount of money for said articles than they were in fairness worth, then the plaintiff corporation was guilty of such fraudulent conduct as would make the policy void, and if you so find your verdict should be for defendant.

I further charge you that any statements made by the officers and agents of the plaintiff corporation concerning the amount or value of the property alleged to have been destroyed, or any statements as to the condition and value of said property written in the

proof of claim, or made here on the witness stand, and that were made fraudulently and with the intention of fraud, would render the policy void.

The court further instructs you that if you believe by a preponderance of the evidence that any officer or agent of the plaintiff corporation submitted to the defendant in support of its claim any books containing any false entries or any fraudulent or false invoices for merchandise or machinery never received or for work never done, or increasing and exaggerating the value of any property alleged to have been destroyed by the fire, the verdict should be for the defendant.

2. I charge you that the burden of establishing fraud rests upon the defendant company. Such fraud on the part of the plaintiff must be established by a preponderance of the evidence. You are to consider the proof of loss submitted by the plaintiff to the defendant, which is in evidence, and all the circumstances and facts to which the testimony of the witnesses has referred regarding the filing of said proof of claim and the facts and book entries submitted to substantiate the same and all other circumstances regarding the condition of the property and the nature and origin thereof.

I further charge you that fraud need not be established by direct proof. In a great majority of cases where fraud exists, it becomes impossible to bring witnesses who can give direct proof that fraud exists. For this reason it may be established by circumstances that convince you that fraud was actually intended and committed by the plaintiff. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires.

(In margin:) These circumstances must preponderate over other testimony to the contrary.

3. I further charge you that if from the evidence produced at this trial you believe that the officers of the plaintiff corporation knowingly and wilfully made

false statements regarding material facts set out in the proof of loss submitted to the court regarding the value and amount of property destroyed, the intention to deceive the defendant company must be necessarily implied as a natural consequence of said acts and you must then find for the defendant.

In cases of this kind the plaintiff must come into court with clean hands, the Insured is presumed to know better than anyone else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law thus defeats all claims unless honestly made. It is intended to protect insurance companies from frauds which might otherwise be perpetrated on them and is a rule which can do an honest man no harm.

(In margin:) It is also a matter of public policy.

These were given with some slight modifications (Record on Appeal, pp. 310-313).

No Exceptions were Taken to the Giving of Petitioner's Requested Instructions, or to the Modification of Respondent's Instructions on the Question of Fraud."

No exception was taken by respondent to the charge of the court, to the modification of respondent's instructions, or to instructions given for Plaintiff submitting to the jury the question of the willful and intentional character of the alleged false and fraudulent proofs of loss and declarations.

See pages 315, 316 and 317 (Record on Appeal) where appear the exceptions taken by the parties at the conclusion of the charge.

Respondent apparently changed its theory and accepted, and presented to the jury one to the effect that the alleged fraud was a matter for the jury to determine.

Verdict.

The jury, in view of the instructions given for petitioner and respondent and of the charge given by the Court, found a verdict for petitioner in the sum of $17,000 plus interest at 6% (page 24, Record on Appeal).

No motion for a new trial or in arrest of judgment was presented by respondent.

The judgment of the District Court was entered upon the verdict in favor of petitioner and against respondent for the sum of $17,000 with interest at 6% (page 24, Record on Appeal).

Assignment of Errors, of Appellant.

The only assignment of errors of Appellant material to be considered in connection with the decision of the Circuit Court of Appeals complained of, is assignment number 10 (page 28, Record on Appeal).

> "10. That the verdict and judgment are contrary to law in that the amount of loss found by the jury in the said verdict considered in connection with the admission of plaintiff and the evidence of plaintiff is inconsistent with any theory other than that of fraudulent over valuation in plaintiff's sworn proof of loss."

Decisions and Judgments of the Circuit Court of Appeals.

A. The decision and judgment of May 25, 1935 unanimously affirmed the judgment of the District Court, opinion by Justice Morton. (77 F. (2d) 891.)

Pertinent portions of this opinion which are material to be considered for an understanding of the later decision sought to be reviewed by this petition for review are the following:

> "There are ten assignments of error, the first seven of which relate to the refusal of the District Judge to direct a verdict for the defendant, and the next two to

rulings or refusals to rule with respect to damages. The last assignment appears not to be based on any ruling by the trial judge and attempts to bring directly to this court the question whether the verdict and judgment are contrary to law because the amount of damages found by the jury is so much less than the amount of the plaintiff's claim as to prove conclusively that the claim involved fraud. There is no assignment of error with respect to any rulings of law on the portions of the policy relied on in defense. The law of the case was clearly and accurately explained to the jury in a manner which it would not be easy to improve upon (page 325, Additional Record).

* * * * * * *

"As to the tenth assignment of error the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent over-valuation by the plaintiff in the proof of loss. Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it (page 326, Additional Record).

"The remaining assignments of error, the eighth and ninth, relate to the refusal of the trial judge to instruct the jury as to certain items in the plaintiff's claim, that there was no evidence of the value of them. The first of these items is 'the cost of labor claimed in the complaint and in the proof of claim in the amount of $2524.56.' The policy covered by its terms, the expense to the plaintiff of labor which it

had put upon goods of other parties which were sent to it to be manufactured and were destroyed in the fire. The defendant's contention is that there was no evidence as to the value of such labor. The expert accountant called by the plaintiff testified that this item appeared on its books, and he referred the item to certain vouchers which constituted part of the plaintiff's records. The proof of loss, which was sworn to, was put in evidence; it contained the item in question. The plaintiff's president, Mr. Soler, was examined and cross-examined with reference to this proof of claim and to various items in it including this one about which he testified at some length. The details which made up this amount were not presented, nor do they appear to have been specifically called for by the defendant during the trial. From the testimony of the accountant they may have appeared on slips and other informal records which were put in evidence. The District Judge left the matter to the jury saying that this amount was not recoverable 'unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence, —I do not recall it,—but if you find it from the record then you can find only for such amount as the plaintiff actually paid for labor.' We think this ruling was correct" (page 326, Additional Record).

The judgment of the District Court is affirmed with costs." (page 327, Additional Record.)

B. Decision and judgment sought to be reviewed, of January 7, 1936.

Notwithstanding the unanimous decision and judgment first rendered, the court, by Justice Bingham—Justice Morton dissenting—sustained the petition of Respondent for rehearing and rendered judgment vacating its previous judgment, vacating the judgment of the District Court, and remanding the case to the latter court with directions to enter an order for arrest of the judgment with costs to

the appellant in both courts (page 343, Additional Record —case not yet reported).

After considering and resolving in the affirmative the power of the Circuit Court of Appeals to arrest the judgment of the District Court, notwithstanding the peculiar circumstances in this case which distinguishes it from the case of *Slacum* v. *Pomery*, 6 Cranch 221, upon which the Circuit Court of Appeals relied, the court disposed of the case upon the question raised by the tenth assignment of error (page 28, Record on Appeal).

> "10. That the verdict and judgment are contrary to law in that the amount of loss found by the jury in the said verdict considered in connection with the admissions of plaintiff and the evidence of plaintiff is inconsistent with any theory other than that of fraudulent over valuation in plaintiff's sworn proof of loss."

The reasoning of the court in its reconsideration of this assignment of error is set forth in the following applicable portion of the decision:

> "In considering the question raised by the 10th assignment the evidence introduced at the trial and brought here by bill of exceptions is not to be considered, for that is no part of the record proper. The inquiry is confined to such matters as appear in the record proper. That record in this case includes the complaint, proof of loss and the policy (which are included in the complaint), the verdict and judgment" (page 344, Additional Record).
>
> "In the complaint it is alleged that, on the 9th day of February, 1932, the defendant issued to the plaintiff a policy of fire insurance, insuring its goods and property, for one year from the date of the policy, against loss or damage caused by fire in the sum of $30,000; that 'the description of the property insured, the location thereof and the amounts covered by the said policy of insurance' were as follows" (page 345, Additional Record):"

Here follows the description and location of the property insured together with the distribution thereon of the amounts covered by the policy (page 345, Additional Record).

"The 10th condition of the policy provided that 'on the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company a claim in writing for the loss and damage, etc.' And in condition 12 it is provided:

'If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 17th Condition of this policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this policy shall be forfeited.' (Page 346, Additional Record.)

"Under the first item of the policy covering the property there specified in the sum of $15,000.00 the plaintiff claimed in its proof of loss the destruction of property valued at $17,345.21. Under the second item of the policy covering the property there specified in the sum of $12,000.00, it claimed in its proof of loss the destruction of property valued at $14,835.10. And under the third item insuring property for $3,000, it claimed in its proof of loss $3,745.75—making a total valuation of property claimed to have been destroyed of $35,926.06, the total insurance being $30,000" (page 346, Additional Record).

"The verdict of the jury was for $17,000, and the judgment entered was for that amount. It thus appears in the record proper that the total amount of insurance on the property was $30,000; that the total value of the property insured, as claimed and sworn to in the proof of loss, was $35,926.06, and that the verdict and judgment were for $17,000, or something less than half the total value of the property sworn to in the proof of loss upon which the plaintiff sought to have the company pay it $30,000" (page 346, Additional Record).

"The defendant contends that the great disparity between what the jury awarded ($17,000) and what the plaintiff would have been entitled to ($30,000) had it had property on hand at the time of the fire of the value of $35,926.06, as claimed and sworn to in the proof of loss, necessarily shows that the proof of loss contained fraudulent statements as to the value and character of the property on hand and insured" (page 346, Additional Record).

"It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000 shows on its face and as a matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000" (page 347, Additional Record).

"A similar question arises under the motion for a directed verdict based upon the evidence as to the cost of labor. The cost of labor was one of the elements insured under the policy. It was set down in the proof of loss at $2,524.50" (Additional Record, p. 347).

"Under the motion for a directed verdict the evidence introduced at the trial and included in the bill of exceptions is open for consideration. There is no evidence in the case and counsel for the plaintiff has pointed out none, though requested to do so, showing that the cost of labor 'on goods in process' was

$2,524.50, as stated in the sworn proof of loss. The only evidence in the record relating to that subject is that given by Soler himself (president of the plaintiff company) where he states that the sum of $2,524.50 was the contract price which the company was to receive for manufacturing the goods of others. If the statement in the proof of loss, to which Soler made oath, did not represent the cost of labor, but was the contract price which the plaintiff was to receive from others for whom goods were being manufactured, no other conclusion can reasonably be drawn than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that the plaintiff was not entitled to and was fraudulent. And, under Condition 12 of the policy, deprived the plaintiff of its benefits. Soler was the president of the plaintiff company and made oath to the proof of loss'' (p. 347).

''We had a similar question before us in *Cuetara Hermanos* v. *Royal Exchange Assurance Co.*, 23 F. (2d) 270; certiorari denied, 277 U. S. 590. Article 13 of the policy in that case read the same as Condition 12 of this one. There the value of the property destroyed was largely overstated in the proof of loss and we sustained a directed verdict for the defendant on the ground that the claim made either in the proof of loss or in evidence at the trial was false and so excessive from the standpoint of the value and amount of property actually destroyed that the District Court did not err in directing a verdict for the defendant'' (p. 347-348).

''Our order of May 23, 1935, affirming the judgment of the District Court of Puerto Rico is vacated; the judgment of the District Court of Puerto Rico of May 31, 1934, is vacated, and the case is remanded to that court with directions to enter an order in arrest of judgment, with costs to the appellant in both courts'' (page 348, Additional Record).

The portion of the dissenting opinion of Justice Morton not previously set forth herein is as follows (p. 348, Additional Record):

"Morton, J. (dissenting): My brethren hold first that fraud on the part of the plaintiff conclusively appears on the face of the record without considering any evidence, and second that fraud on the part of the plaintiff with respect to a certain item in the proof of loss was so conclusively established by the evidence that the defendant was entitled to a directed verdict. On neither point am I able to agree.

"As to the first point, passing by immaterial matters, the record before us consists of the complaint with the papers annexed to it, *i. e.*, the policy and the proofs of loss, the answer which sets up many defenses including fraud, and the verdict which was for just about one-half the amount claimed in the proofs of loss. Looking at these papers and nothing else, my brethren hold that fraud on the part of the plaintiff is conclusively established by the discrepancy between the amount of the claim and the amount of the verdict. In the opinion they say, 'the evidence introduced at the trial and brought here by bill of exception is not to be considered, for that is no part of the record proper.' No precedent for the decision is referred to and none has come to my attention (p. 348).

"Fraud as used in this policy means conscious dishonesty. It is a matter of fact. The majority opinion holds, in effect, that, when the amount claimed in a proof of loss under a fire insurance policy is cut down one-half by the jury on the trial of the case, fraud is thereby conclusively established and the proofs cannot under any circumstances have been honestly made. It seems to me, on the contrary, very easy to conceive circumstances under which the amount honestly claimed in a proof of loss might be cut down one-half by a jury. On questions of valuation, and sometimes also on questions of ownership for insurance purposes, there is wide room for honest mistakes and honest

difference of opinion. If we assume, as I think we must, that the jury were properly instructed that fraudulent statements by the plaintiff in the proof of loss would entitle the defendant to a verdict, then the verdict for the plaintiff necessarily involved a finding on the evidence presented that the proofs of loss were not fraudulent. This finding is set aside without considering the evidence (p. 348-349).

"If the verdict for the plaintiff be regarded as inconsistent with the finding on damages, that point should, I think, have been brought to the attention of the trial judge on a motion to set the verdict aside, which was not done. It cannot be presented indirectly in this way. How can we say that the error in the verdict—if there was one—did not consist in awarding inadequate damages on an honest claim, rather than awarding any damages on a dishonest one? Such questions necessarily involve an examination of the evidence. Again the instructions to the jury as to the law under which damages should be assessed—which are not before us—may have been very different from what the plaintiff had in good faith supposed the law to be. Such a mistake is not fraud. For these reasons and others which might be mentioned I do not think that the discrepancy between the claim and the verdict conclusively proved that the claim was fraudulent" (page 349, Additional Record).

Petitioner's Contentions.

The petitioner contends that the later decision of the majority members of the Circuit Court of Appeals sought to be reviewed, which erroneously held that the discrepancy caused by the verdict of the jury from the claim of petitioner established the basis and the right of the court to declare that as a matter of law the claim or proof of loss was fraudulent, and thereby voided the policy; is in irreconcilable conflict with decisions of this Court and of

other circuit courts of appeals and is untenable with the weight of authority.

Under the uniform decisions of this Court and of the circuit courts of appeals the existence of fraud in connection with claims and proofs of loss is a question to be determined by the jury upon satisfactory evidence of wilfulness and intent, not reconcilable with good faith or innocent mistake.

Reasons for Granting the Writ.

Under the decision complained of any discrepancy whatsoever, regardless of amount and of fraud, would justify the trial court to set aside the verdict and arrest the judgment or, if it did not do so, the Circuit Court of Appeals would be justified in vacating and arresting the judgment as a matter of law, without regard to any evidence submitted to the jury of good faith or innocent mistake.

As in the present case with reference to the claim or proof of loss concerning the value of machinery there could be in other cases an honest difference of opinion between the insurer and the insured as to whether the latter should claim and recover the cost or replacement value, or the present market value, which difference might represent an important sum.

The law declared by the majority members of the Circuit Court of Appeals is too broad and drastic.

Whilst it is the purpose of the courts to discourage fraud in connection with insurance claims and proofs of loss they cannot, with due regard to justice and judicial authority, ignore the elements of good faith and human liability to innocently err in estimates of value.

The decision sought to be reviewed presents a serious conflict in an important field of litigation with the decisions of this Court, of the circuit courts of appeals in general,

and with the weight of authority which should be removed in the interest of harmony and order in the administration of justice.

WHEREFORE, it is respectfully requested that this petition for a Writ of Certiorari be granted.

San Juan, Puerto Rico, March, 1936.

FRANCIS H. DEXTER,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The original decision and the later one upon rehearing which is complained of are hereto attached in the Additional Record (Original Decision, p. 323; decision upon rehearing, page 343) and pertinent extracts therefrom involved in the questions presented appear in the petition preceding (pages 16 to 24).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (Section 347 (a), Title 28, U. S. C. A.). The time to apply for a writ of certiorari was extended thirty days, or until May 6, 1936 by order of Mr. Justice Brandeis made March 12, 1936.

The Facts.

The facts pertinent to be considered are fully set forth in the statement in the preceding petition (pages 4 to 16).

Specification of Errors.

The errors which we believe were committed by the Circuit Court of Appeals in its later decision are contained in the Questions Presented and Petitioner's Contentions set forth in the preceding Petition.

ARGUMENT.

Conflict of the Decision Complained of With the Leading Case of This Court Upon the Same Matter.

In the case of *Republic Fire Insurance Co.* v. *Weide*, 14 Wallace 375, this Court held:

> "Under a policy, one of whose conditions is that fraud or false swearing on the part of the assured in an examination which, by the terms of the policy, he was bound to submit to on a claim by him for loss, it is only fraudulent false swearing in furnishing the preliminary proofs or in the examination which avoids the policy; *and whether there has been such false swearing is a matter for the jury to determine.*" (Italics ours.)

In its opinion (page 382) the Court declared:

> "* * * It is true the policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. *But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath in their proofs of loss, and their statements when testifying at the trial that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants.* It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that voids the policies, and it was for the jury to determine whether that swearing was false and fraudulent." (Italics ours.)

It does not appear in the report of this case what was the amount of the claim or the verdict of the jury. There was apparently a discrepancy. It appears that the Court affirmed the judgment of the court below and sustained the action of that court in refusing instructions presented by the insurance company which, in effect, declared that as a matter of law a discrepancy between proofs of loss and statements made by the assured on the trial justified the court in assuming fraud and directing a verdict for the company. The court below properly refused to direct a verdict for the company upon the presumption that the discrepancy established fraud on the part of the assured.

The case of *Claflin* v. *Insurance Company,* 110 U. S. 81, will probably be relied upon by respondent, as it has been in other cases, to establish a ruling of this Court contrary to that in the former case. The *Claflin* case is distinguished from the former case in several important respects.

Great American Insurance Company of New York v. *Roney & Berger Co.,* 42 F. (2d) 816 (Circuit Court of Appeals, 3rd Circuit), distinguishes the two cases as follows (page 818):

> "The only case on which defendants rely is *Claflin* v. *Insurance Company,* 110 U. S. 81.
>
> "That decision does not rule this case because it is distinguishable on the issue, which was not whether the insured had made a false claim, but whether the matter with respect to which he made an alleged false statement was material under the forfeiture clause of the policy, and distinguishable on the fact, proven or admitted, that the insured did make a statement with respect to a material matter, which was false."

The *Claflin* case may be further distinguished: (a) it held that the jury could find great discrepancy as evidence of fraud which would forfeit the policy, but it did not declare that the court upon such evidence should declare it a fraud

which, as a matter of law, would forfeit the policy; (b) the *Claflin* case did not refer to the *Republic Insurance Company* case, much less overrule it.

If the *Claflin* case was intended by the Court to establish a contrary doctrine to that established in the former case the Court would have expressed such intention, or purpose.

Conflict Between the Decision Complained Of and the Decisions of Other Circuit Courts of Appeals.

The first decision precisely in point reported in the Federal Reporter System is that of

Mack v. *Lancashire Insurance Company,* 4 Fed. Rep. 59.

This was a decision of the United States Circuit Court for Missouri. We believe that as the United States Circuit Courts were the predecessors of the present United States Circuit Courts of Appeals the decisions of the former will be considered upon the question of conflict.

That case held:

> "The mere fact that the loss is less than that stated in the preliminary proof, would not be sufficient to establish fraud, though if the discrepancy between the true value and that stated by the insured is large, it would be some evidence bearing upon the issue of fraud."

The discrepancy was only evidence to be considered by the jury in the determination of the alleged fraud and was not considered as a matter of law to establish the alleged fraud so as to justify a directed verdict for the insurance company.

> "A sworn statement of the insured as to the amount of the loss, although found to be exeessive, does not constitute false swearing or misrepresentation which

will avoid the policy, where it was made in good faith and there was room for an honest difference of opinion as to whether the loss was total or partial."

Spring Garden Insurance Co. v. *Amusement Syndicate Co.*, 178 Fed. 519 (Circuit Court of Appeals, 8th Circuit).

In that case the proof of loss amounted to $57,373.73. The finding of the Master and the decree of the court thereon was $21,991.08.

The Circuit Court of Appeals affirmed the decree notwithstanding the defense of fraud and some evidence in support thereof. In its opinion (page 531) the court said:

"There was a conflict of evidence in this regard, and an honest difference of opinion is not false swearing within the meaning of the policy so as to avoid these provisions." Citing, *Insurance Company* v. *Weide*, 14 Wallace 382.

"Refusal of points in action on fire policy, as to concealment, or attempt to conceal, material information, held not error when court charged in substance;

" 'Defendant presented points for charge that, if plaintiff concealed or attempted to conceal from defendant material information as to cause of fire, or value of insured property, the verdict must be for defendant.'

"The trial judge charged the substance of the points and also charged on fraud and misrepresentation, and submitted the real question as to whether plaintiff's claim was honestly made or fraudulent because of false statement wilfully made, supported by false swearing."

Great American Insurance Co. v. *Roney & Berger Co.*, 42 F. (2d) 816 (C. C. A., Third Circuit).

The court of appeals affirmed the judgment of the District Court. In this case the insurance was $205,000, the claim of loss $239,585.04, and the verdict was for $204,416.

The court cited *Insurance Company* v. *Weide*, 14 Wallace 375.

In its opinion (page 818) the court declared:

> "The judge charged all that was required, and could have done nothing more unless, as we understand defendant's present position, he should have instructed the jury that, in view of the testimony of the officers of plaintiff company and of the testimony contradicting them, it was their duty to find that there had been fraud and false swearing as to the value of the property destroyed and that therefore, the policies were void.
>
> "*Holding that the issue was not determinable as a matter of law, and hence not subject to a directed verdict,* there was no error in submitting it to the jury." (Italics ours.)

Bearing upon Question D we submit the following extract from this opinion (page 820):

> "We realize that we are not in so favorable a position to pass upon the question as was the trial judge, who having heard the case, could sense its effect upon the jury. We are also aware that it is because of that very advantage that the law submits matters such as this to the trial judge to be disposed of entirely within his discretion, and provides that *his action shall not be disturbed by an appellate court except when he has abused his discretion.*" (Italics ours.)
>
> "Incorrect statements in proof of loss as to quantity of cotton destroyed by fire, if honestly made, did not render the policy void.
>
> "Whether incorrect statements in proof of loss as to quantity of cotton destroyed by fire were fraudulently or innocently made, under evidence held a jury question."
>
> *Camden Fire Insurance Co.* v. *Penick*, 2 F. (2d) 964 (C. C. A. 5th Circuit).

In this case a verdict and judgment of the District Court finding for the insured notwithstanding a discrepancy of eighty-eight (88) bales of cotton in its proof of loss was affirmed. The District Court refused a motion for a directed verdict.

The Court of Appeals in its opinion (page 965) referring to this action of the District Court, which was assigned as error, declared:

> "and instead instructed the jury that false swearing which would deprive plaintiff of the right to recover must be a wilful, intentional act and that if the jury found it was so made plaintiff could not recover. • • • There was no error in denying defendant's motion for a directed verdict; if statements made by plaintiff in his proof of loss were honestly made, although they were admittedly incorrect, they did not render the policy void."
>
> (Citing, *Republic Insurance Co.* v. *Weide,* 14 Wallace 375).

> "We are of the opinion that whether the claim was fraudulently or innocently made was a question peculiarly within the province of the jury."
>
> "Fraud and false swearing in stating in proof of loss that the cause of fire was unknown and that entire loss was due to fire, fixing value of property in inventory furnished to insurers, and claiming total loss from both fire and explosion in proofs of loss under fire and explosion policies respectively, held for the jury."
>
> "An action on fire insurance policy and instruction that if evidence showed that any of the insured property damaged or destroyed by explosion preceding fire plaintiff swore falsely in proofs of loss, and verdict must be for defendant, held properly refused as fairly covered in the general charge, and not stating that untrue statement must have been knowingly and wilfully made to constitute false swearing in the policy."
>
> *Atlas Insurance Co.* v. *Hurst,* 11 F. (2d) 250 (C. C. A., 8th Circuit).

In this case the judgment of the District Court was affirmed although it appeared that the insurance was for $27,000, the proof of loss, $39,000, and the verdict $5,329.16. In its opinion (page 253) the court declared:

> "*We conclude that the defense of fraud and false swearing was not conclusively established by the evidence but that it depended upon the determination of the controverted issues of fact*, and that it was proper to submit those issues to the jury for decision." (Italics ours.)
>
> "In order that false swearing as to value shall constitute a defense to an action on fire policy it must be made to appear that the over valuation was intentional and fraudulent."
>
> "Where the question as to false swearing as to value in an action on a fire policy was properly submitted to the jury, the *appellate court cannot disturb the jury's finding against insurer.*" (Italics ours.)
>
> *National Fire Insurance Co.* v. *Renier*, 22 F. (2d) 671 (C. C. A., 7th Circuit).

In this case the Court of Appeals affirmed the judgment of the District Court which had overruled a motion to direct a verdict based upon the alleged discrepancy between the proofs of loss and the evidence upon the trial.

> "The jury's special finding that the insured stock of merchandise destroyed by fire was worth $25,000, held not inconsistent with finding by the general verdict for insured in an action on the policy that the insured and his son honestly believed the property was worth over $39,000, as they testified."
>
> *Connecticut Fire Insurance Co.* v. *Hurst*, 11 F. (2d) 254 (C. C. A., 8th Circuit).

> "To prevent recovery on a fire policy under a clause against false swearing, over valuation must have been knowingly and intentionally made."

> "Ordinarily, where there is evidence from which intentional over valuation may be inferred within false swearing clause of fire policy, the question whether it was intentional and with intent to deceive or defraud is a jury question."
>
> *Globe & Rutgers Fire Insurance Co.* v. *Stallard*, 68 F. (2d) 237 (C. C. A., 4th Circuit).

In the case of the *American Central Insurance Co.* v. *Harmon Knitting Mills*, 39 F. (2d) 21 (C. C. A., 7th Circuit), the court affirmed a judgment where there was a discrepancy between the proofs of loss and the judgment, although reducing the latter in the sum of $33,000.

The majority of the court in the opinion complained of referred to the previous case of *Cuetara Hermanos* v. *Royal Exchange Insurance Co.*, 23 F. (2d) 270, in which the court sustained a directed verdict for the defendant on the ground that the claim made either in proof of loss or in evidence at the trial was false and so excessive from the standpoint of the value and the amount of property actually destroyed that the District Court did not err in directing a verdict for the defendant.

We respectfully submit that the power of the Circuit Court of Appeals was not the same in the two instances. In that case the Circuit Court of Appeals sustained the action of the District Court which granted the motion to direct a verdict because in that case the District judge found that there was not sufficient evidence to submit the case to the jury.

In the present case the District Court found that there was sufficient evidence to submit the case to the jury, and the record herein justifies its action.

Having so acted it was within the province of the jury to determine whether petitioner was guilty of wilful and intentional fraud which forfeited its policy.

In a similar manner may be distinguished the case of *Columbian Insurance Co.* v. *Modern Laundry,* 277 Fed. 355 (C. C. A., 8th Circuit), and other cases where the question of wilful and intentional fraud had been submitted to the jury.

Conclusion.

Finally, in the present case there is no error apparent of record from the entry of judgment upon the verdict of the jury.

The jury had the right to find as they did upon a matter and to an amount which, under the law, it was their province to consider and determine.

The case of *Slacum* v. *Pomeroy,* 6 Cranch 221, relied upon by the Court of Appeals, and the cases which may be relied upon by respondent to support the proposition that no exception was necessary to be taken to the verdict or the judgment do not apply.

Those cases only apply to such verdicts upon which the court cannot legally enter judgment because of the issues involved in the case in question, or to put it in another way, they only apply to judgments upon which the court "has no foundation" to enter.

The verdict in this case was the result of the instructions given at the request of respondent properly stating the law under the evidence in the case, both of which were the legitimate basis for the verdict and the foundation for the judgment.

The judgment of the Circuit Court of Appeals of January 7, 1936, should be reversed.

San Juan, Puerto Rico, March, 1936.

Respectfully submitted,

FRANCIS H. DEXTER,
Atty. for Petitioner.

Copy of the foregoing petition and brief and of the accompanying record received, March 30th, 1936, subject to the receipt of printed copy of petition and brief.

HENRI BROWN,
By G. E. GONZALEZ,
Attorney for United Firemen's Insurance Co. of Philadelphia.

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SUPREME COURT OF THE UNITED STATES

October Term, 1936

JOSE RIVERA SOLER & CO., INC., *Petitioner*

vs.

THE UNITED FIREMENS' INSURANCE CO. OF PHILADELPHIA,
Respondent

No. 31

SUPREME COURT OF THE UNITED STATES

October Term, 1936

JOSE RIVERA SOLER & CO., INC.

Petitioner,

vs.

THE UNITED FIREMEN'S INSURANCE CO. OF PHILADELPHIA,

Respondent.

MEMORANDUM BRIEF OF PETITIONER SUBMITTED UPON HEARING

In the brief of Petitioner in support of the petition herein we submitted argument and authorities to demonstrate the error of the majority of the United States Circuit Court of Appeals in the judgment complained of with respect to the substantial legal issues involved and stated in "Questions Presented" A, B and C.

We did not submit argument or authorities in support of "Question D" relating to the fundamental error of procedure commited in vacating the judgment of the District Court and ordering an arrest of that judgment rendered and entered on the verdict for Petitioner (Plaintiff), instead of remanding the case for a new trial if its action on the substantial issues was justified by the law.

Though we rely now confidently, as we did when we submitted our former brief, upon the substantial error of the majority of the Circuit Court of Appeals which demands a reversal of its judgment upon rehearing and an affirmance of the judgment of the District Court we feel that we should not pass unnoticed the grave error of procedure by which Petitioner was deprived of its constitutional right to have the issues of fact involved in the case retried by a jury in accordance with the law governing them, in the improbable event that the action of the court on the substantial question of law might have been valid.

The action of the majority of the Circuit Court of Appeals in vacating the judgment of the District Court and ordering an arrest of the judgment on the verdict in favor of petitioner (Plaintiff) was in effect the direction of a judgment in favor of Respondent (Defendant) *non obstante veredicto,* which procedure was held by this court to be unconstitutional and void in the leading case of Slocum vs. New York Life Insurance Co. 228 U. S. 364, which ruling has been followed in numerous cases in this court to the present time.

To all intents and purposes the legal effect of the action of the majority of the Circuit Court of Appeals was precisely what this court condemned in the Slocum case:—

> "In other words, the Circuit Court of Appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of pleadings, but that it was warranted by the evidence". (Opinion, page 376).

The verdict and judgment in the present case are the result of the evidence, as was the judgment directed to be entered by the Circuit Court of Appeals in the Slocum case, and it is because of the evidence, as charged in the 10th assignment of error that appellant

below, Respondent herein, and the majority of the Circuit Court of Appeals claim that the judgment of the District Court is a nullity.

The majority decision of the Circuit Court of Appeals upon the rehearing placed mistaken reliance upon the case of Slocum v. Pomeroy, 6 Cranch 221, extending the scope of that decision to fields unexplored by the court and to situations not included in its decision. The concluding remark of Chief Justice Marshal at the close of that opinion seems to imply a negation of the power exercised by the majority of the Circuit Court of Appeals in the present case.

> "After the opinion was delivered, Youngs prayed that the cause might be remanded with leave to amend".
> Marshal, Ch. J:— "Here is a verdict, which must be set aside, before an amendment can be allowed. It might be set aside by the court below, but this court can see no reason in the record for setting it aside."

In that case the judgment below was arrested because of a "fault in the declaration".

The legal defect in a record which justifies an arrest of judgment by an appellate court must be one that is inherent or intrinsic to the existence and maintenance of the cause of action.

The decision of the majority of the Circuit Court of Appeals, complained of, constitutes a tacit admission that in the record up to the moment of the verdict no defect or vice appeared which would have justified the Circuit Court of Appeals in arresting the judgment entered upon the verdict rendered in favor of Petitioner (Plaintiff).

The decision tacitly approves the action of the District Court in refusing to grant the motion of Defend-

ant, (Respondent) for a directed verdict, which in its Paragraph III (Page 13 of the Record) alleged fraudulent overvaluation in the claim and testimony of plaintiff *as it appeared in the evidence,* which action was the subject of the 7th assignment of error (Page 26 of the Record).

The decision complained of is also an admission that the issues of law and fact were properly submitted to the jury.

The decision was based exclusively upon the single point that the discrepancy between the amount claimed by Petitioner (Plaintiff) and that allowed it by the jury constituted fraud as a matter of law which forfeited the right to recover on the policy of insurance; and that when the result of the legal verdict was expressed in a regular and legal judgment the record of that judgment as a matter of law nullified not only the judgment itself but also the complaint and all proceedings thereunder as well.

The jury unquestionably had the right and the power to determine if Petitioner (Plaintiff) had been guilty of fraud in connection with its proofs of loss and to ascertain the amount of such loss in the absence of such fraud.

The contention of the majority of the Circuit Court of Appeals and the effect of its decision are to convert a legal record (in the sense of its invulnerability to arrest of judgment) into an inherent or intrinsic illegal record by the extraneous and regularly legal exercise by the jury of its functions with respect to the evidence of which it was sole judge, and upon the instructions of law which the majority of the Circuit Court of Appeals tacity and impliedly admit were not objectionable. This does not seem to make logical or legal sense.

The majority decision of the Circuit Court of Appeals complained of violated not only the doctrine

firmly established by this court in the case of Slocum vs. New York Life Insurance Co. but it is inconsistent with its own previous decisions.

2. "In an action for breach of an alleged contract for the sale of a sugar plantation, the Circuit Court of Appeals, though finding there was no evidence warranting submission of the case to the jury and that a verdict should have been directed for defendant, cannot, on defendant's writ of error, enter a verdict and render judgment for defendant, but must remand for new trial".
Sucrerie Central Coloso de Porto Rico v. Fajardo, 248 Fed. 432.

We respectfully submit that the judgment of the majority of the Circuit Court of Appeals complained of should be reversed and that the judgment of the District Court of the United States for Puerto Rico should be affirmed.

In the contingency that the action of the majority of the Circuit Court of Appeals in the decision and the judgment complained of should be held to be without error on the substantial question of law involved, we request that such judgment be reversed and the case remanded to the District Court for a new trial in accordance with the principles and rule which this court may establish upon the merits of the case.

San Juan, P. R., September 1936.

JOSE RIVEBA SOLER & CO. INC.,
Petitioner.

FRANCIS H. DEXTER,
Attorney.

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Supreme Court of the United States

OCTOBER TERM—1935.

No. [redacted] 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

against

UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRI BROWN,
San Juan, P. R.

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New York, N. Y.,
Counsel for Respondent.

INDEX

	PAGE
OPINION BELOW	1
STATEMENT OF THE CASE	1
NATURE OF DECISION BELOW	3

ARGUMENT

I. The decision of the Circuit Court of Appeals is not in conflict with any decision of this court or of any Circuit Court of Appeals.
On the contrary, it is in strict accord with authority 5

II. The result reached below is correct for the additional reason that petitioner's failure to comply with the Iron Safe Clause entitled respondent to the direction of a verdict in its favor 12

TABLE OF CASES

American Central Ins. Co. *v.* Harmon Knitting Mills, 39 Fed. 2d 21 6
Atlas Ins. Co. *v.* Hurst, 11 Fed. 2d 250 6

Camden Fire Ins. Ass'n *v.* Penick, 2 Fed. 2d 964 6
Connecticut Fire Ins. Co. *v.* Hurst, 11 Fed. 2d 254 6
Cragin *v.* Lovell, 109 U. S. 195 12

Domagalski *v.* Springfield Fire & Marine Ins. Co., 218 N. Y. App. Div. 187 9
Dorroh-Kelly Co. *v.* Orient Ins. Co., 104 Texas 199, 135 S. W. 1165 14

Globe & Rutgers Fire Ins. Co. *v.* Stallard, 38 Fed. 2d 237 6
Great American Ins. Co. *v.* Roney & Berger Co., 42 Fed. 2d 816 6
Gunther *v.* Liverpool Ins. Co., 134 U. S. 110, 116 5

Hamilton Shoe Co. *v.* Wolf Bros., 240 U. S. 251 4
Hanover Fire Ins. Co. *v.* Moore, Texas , 280 S. W. 538 14
Hermanos *v.* Royal Exchange Ins. Co., 277 U. S. 590 5
Hiller Co. *v.* Insurance Co. of N. A., 125 La. 938, 52 So. 104 10
Home Ins. Co. *v.* Williams, 237 Fed. 171 ..... 15, 16
Houff *v.* German Ins. Co., 110 Va. 585, 66 S. E. 831 16

Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452 14
Insurance Companies *v.* Weides, 14 Wall. 375 5

Langnes *v.* Green, 282 U. S. 531 13
Levy *v.* Baillie, 7 Bing. 349 10

Mack *v.* Lancashire Ins. Co., 4 Fed. 59 5
McLeod *v.* Citizens Ins. Co., 13 Nova Scotia 21 10

National Fire Ins. Co. *v.* Renier, 22 Fed. 2d 671 6

Pangburn *v.* Buick Motor Co., 211 N. Y. 228 11

PAGE

Riley v. Ætna Ins. Co., 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983.. 10

Scottish Union Ins. Co. v. Virginia Shirt Co., 113 Va. 353, 74 S. E. 228.... 16
Slacum v. Pomery, 6 Cranch. 221 12
Small, A. B. Co. v. Lamborn & Co., 267 U. S. 248 5
Spring Garden Ins. Co. v. Amusement Syndicate Co., 178 Fed. 519 6
Sternfeld v. Park Fire Ins. Co., 50 Hun 262 7

United States v. American Ry. Exp. Co., 265 U. S. 425 13

Western Assurance Co. v. Kemendo, 94 Texas 367, 60 S. W. 661 13
Wright v. Union Ins. Co., 13 Fed. 2d 612 16

Supreme Court of the United States

OCTOBER TERM—1935.

No. 928.

JOSE RIVERA SOLER & CO., INC.,

Petitioner,

against

UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,

Respondent.

BRIEF FOR RESPONDENT.

In Opposition to Petition for Writ of Certiorari.

Opinion Below.

The opinion of the Circuit Court of Appeals is now reported in 81 Fed. 2d 385.

Statement of the Case.

No Federal question, and no question of general importance, is presented.

Petitioner sued upon a policy of fire insurance issued by respondent in the sum of $15,000 on merchandise, cost of labor, and materials, $12,000 on machinery, and $3,000 on furniture and fixtures, claiming a total loss and asking judgment for the total amount insured of $30,000 (R. 1-5).

Respondent defended upon the ground of failure to comply with the Iron Safe Clause (R. 9, 10) and upon the ground that the policy had been forfeited by the making of false declarations and fraudulent claims thereunder (R. 7, 8).

The policy required the submission of a proof of loss (R. 250), and in the sworn proof of loss submitted pursuant to that requirement petitioner fixed the "cash value" of the destroyed property "at the time of the fire" at $35,926 (R. 254-263).* That statement as to the nature and value of the property insured and destroyed was repeated in the complaint (R. 3, 4), which likewise was sworn to (R. 5).

At the close of all the evidence, respondent moved for a directed verdict (R. 13, 14, 15), but the motion was denied and the case submitted to the jury (R. 13). Respondent excepted to the denial (R. 13).

The jury returned a verdict for the plaintiff for $17,000 (R. 13, 24). The District Court "ordered that judgment in accordance with the verdict of the jury be entered" (R. 25).

Respondent appealed (R. 25, 26), and assigned as error (a) the refusal to direct a verdict in its favor, (b) two errors in instructions to the jury, and (c) that the verdict and judgment are contrary to law (R. 26-28).

The Circuit Court of Appeals at first declined to consider the last mentioned assignment on the ground that no motion, ruling or exception relating to the matter was had or taken in the District Court (R. 323, 344), but it afterwards granted a rehearing—the petition for which appears at R. 329-342—and sustained that assignment and vacated

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* That was made up as follows:

First item (Merchandise, cost of labor and materials)	$17,345.21 (R. 255)
Second item (Machinery)	14,835.10 (R. 256, 257)
Third item (Furniture and fixtures)	3,745.75 (R. 257, 258)
	$35,926.06

the judgment of the District Court and directed that court to enter an order in arrest of judgment (R. 343, 352).

Nature of Decision Below.

1. Petitioner's assertion that under the decision below "any discrepancy whatever, regardless of amount and of fraud" would justify an arrest of judgment (Pet., p. 25) is wholly without foundation. The decision rests upon the existence of a discrepancy so great as to show fraud (R. 347; 81 Fed. 2d at p. 387). Stated in terms of dollars, the verdict is $13,000 less than it would have been if the property had been worth the amount sworn to, or even within $5,926.06 of the amount sworn to—that is, if the jury had believed that the property was worth either $35,926.06 or any other amount down to $30,000, then the verdict would have been for $30,000, whereas it was for only $17,000. Stated in terms of percentage, the verdict is for but little over 50% of what it would have been if the jury had believed that the property was worth the amount sworn to or any other amount within $5,926.06 of the amount sworn to. Stated in still another form, the jury found that property of an ordinary and staple sort, having no unique characteristics or unusual elements of value, was worth $18,000 less than had been stated in the sworn proof of loss, or just about one-half the amount so sworn to.

The court below obviously did not mean, and nothing in its opinion suggests that it means, that "any discrepancy" would be equivalent to a finding of fraud. All that the decision means is that in this particular case the court regarded the discrepancy as so great as to show fraud.

A ruling of that sort does not justify the extraordinary writ of certiorari pursuant to a jurisdiction which this court

has declared is to be "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision" (*Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 258).

Furthermore, the decision accords with authority (see pp. 5-12, *infra*).

2. Petitioner's further assertion that the decision below rests upon "an incomprehensible oversight by the majority of the court as to the facts in the record" (Pet., p. 2) is likewise unfounded. It is in the opinions of Judge MORTON, not in the final opinion of the court, that the error as to the facts occurs—and his error arises from his failure to distinguish between *goods in process* and *cost of labor on goods in process* (R. 326, 349-350).

It is true that, as Judge MORTON points out at R. 350, the expert accountant, Gorbea, testified that "According to what the books show the plaintiff has * * * goods in process $2524 * * *" (R. 37). But what Judge MORTON overlooked is that the proof of loss contains a claim for "*labor on* goods in process $2524.50" *in addition to* claims for both raw materials and manufactured and unmanufactured goods (R. 255). "Goods in process" and "labor on goods in process" obviously are two entirely different things, and the majority opinion is literally and wholly correct in its statement, at R. 347, that the only evidence in the record as to what the $2524 represents is Rivera Soler's own statement that the item was not for cost of labor but the contract price for finished goods (See R. 111, 112, 118).

Judge MORTON erred, also, in his statement that there is no evidence that Soler was making any profit on this work or did not take it at cost (R. 351), for Rivera Soler specifically stated that he included "the cost of labor, the overhead expenses *and my profit*" (R. 118).

ARGUMENT.

I.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this court or of any other Circuit Court of Appeals.

On the contrary, it is in strict accord with authority.

An examination of the cases cited by petitioner will instantly reveal that none of them presented the situation presented in the case at bar and that the asserted conflict does not exist.

Insurance Companies v. *Weides*, 14 Wall. 375, which is particularly relied upon, holds nothing more than that whether or not there has been such fraud or false swearing as voids a policy is a question of fact which *ordinarily* must be submitted to the jury.* In the case at bar that question *was* submitted to the jury, and what the Circuit Court of Appeals has held is, not that it was error to submit it, but that where the jury finds for an amount grossly disproportionate to the amount sworn to its verdict necessarily imports a finding of fraudulent overvaluation and consequently in legal effect is a verdict for the defendant and does not justify the entry of judgment thereon in favor of the plaintiff.

In *Mack* v. *Lancashire Ins. Co.*, 4 Fed. 59, upon which petitioner also lays considerable stress, the question was submitted to the jury, but the report does not show what the jury found or what judgment was entered upon its verdict.

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* Other cases in this court recognize that it sometimes is proper to direct a verdict for the insurer even upon that question: *Hermanos* v. *Royal Exchange Assurance Co.*, 277 U. S. 590, denying petition for certiorari to review 23 Fed. 2d 270; *Gunther* v. *Liverpool Ins. Co.*, 134 U. S. 110, 116; *A. D. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254.

Spring Garden Ins. Co. v. *Amusement Syndicate Co.*, 178 Fed. 519, was tried before a *master*, who specifically found that the proof of loss was made in good faith and not with any view to deceive (p. 531).

In *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 Fed. 2d 816, the jury's verdict was for *the total amount of the policy sued on* and thus indicated, as pointed out by the court, "a loss of true values equal to or more than the amount of the verdict" (p. 818).

In *Camden Fire Ins. Ass'n.* v. *Penick*, 2 Fed. 2d 964, the verdict and judgment were based on the loss of 788 bales of cotton, which was *the identical amount claimed in the amended complaint.*

Atlas Ins. Co. v. *Hurst*, 11 Fed. 2d 250 must be read in connection with *Connecticut Fire Ins. Co.* v. *Hurst*, 11 Fed. 2d 254, because they were companion cases arising out of the same fire, and the total of all the judgments was $24,182.52 on policies aggregating $27,000.

In *National Fire Ins. Co.* v. *Renier*, 22 Fed. 2d 671, the report does not disclose either the amount claimed or the amount awarded.

In *Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 68 Fed. 2d 237, a judgment in favor of the insured was reversed because of errors in the charge, and all that actually was held was that in the face of conflicting evidence as to the value it was proper to submit the case to the jury.

American Central Ins. Co. v. *Harmon Knitting Mills*, 39 Fed. 2d 21, was an *equity case* in which there was a specific finding of absence of intent to defraud.

Instead of being contrary to authority, the decision below is supported by well-reasoned decisions by courts of high repute.

In *Sternfeld* v. *Park Fire Ins. Co.*, 50 Hun 262 (N. Y. Sup. Ct., General Term, First Dept.), the jury found for the plaintiff for one-half the amount of the defendant's policy, and the judgment was reversed on the ground that the plaintiff's overstatement of his claim constituted a fraud which voided the policy. The court there said (pp. 264-266):

> "To render this verdict the jury must have reached the conclusion, as the whole insurance did not exceed the sum of $10,000, and it was to be divided and equally proportioned between the companies whose policies were issued upon the property, that the whole loss of De Vulder by the fire amounted to no more than the sum of $5,000. This left an over-statement in his proofs of loss of $18,342.47. *To that extent the jury must necessarily have assumed that the proofs of loss were untruthful.* Neither the evidence of De Vulder, nor that of any other witness, tended to explain this difference on the ground of any mistake or misapprehension concerning either of the facts upon which the proofs were made and verified; and, as there was no ground from which it could be inferred that the loss had been overstated in this manner by mistake, there was reason for assuming that it had been fraudulently made to defraud the insurance company out of the other half of the amount of the policy. *Such an inference necessarily follows from so great a difference.* The loss in this manner had been stated by the assured to an amount exceeding three-fifths of what had actually been sustained; and it is not to be supposed or presumed that it could have been so over-stated by any mistake intervening in the statements presented by the proofs. But the inference is direct and plainly to be drawn from this difference, that De Vulder must have known that this statement was untruthful, and his affidavit verifying it was false, and from that the conclusion follows, that it was intended thereby to defraud the insurance company; and this inference is materially strength-

ened by the fact that the preceding inventory of De Vulder's stock, taken in January, 1884, amounted to no more than the sum of $20,478.13, and his business afterwards was not prosperous, and the fire, causing the loss, was of very short duration and confined only to a portion of the store.

"In *Boynton* v. *Andrews* (63 N. Y. 93), property had been taken by a manufacturing corporation for which it had issued its stock. The property was proven to have been worth no more than fifty per cent. of the amount for which it was received by the company and its stock was issued. *And from this difference the court held that the law would assume the transaction to be fraudulent, leaving no question of fact as to the intent to be passed upon by a jury.* Applying the principle of that decision to this case and the inference is much more strongly sustained that there was an intent to deceive and defraud the company by this over-statement of the loss of the assured. *And that the over-statement existed is clear from the verdict of the jury, which proceeded upon the conclusion that the actual loss did not exceed the sum of $5,000. This could have been adopted on no other view of the evidence than that the assured had over-stated his loss to the extent of upwards of $18,000.* And upon that fact necessarily entering into the case, from the verdict which the jury have rendered, *they should, instead of finding for the plaintiff any sum of money, have found in favor of the defendant,* for the policy had provided that, 'any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination or in the proof of loss or otherwise, shall cause a forfeiture of all claim on this company under this policy, and in such case this company shall have the right at any time to require the same to be delivered up to be canceled.' *Under this provision this fraudulent over-statement of the loss forfeited all claim to indemnity*

upon the policy and entitled the company to a verdict against the plaintiff."

In *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 N. Y. App. Div. 187, the plaintiff claimed $22,761.10 in his proof of loss and in his testimony at the trial, and the jury found in his favor for $5,000, and the judgment entered upon that verdict was reversed with an opinion by Presiding Justice HUBBS, now Judge HUBBS of the New York Court of Appeals, which was concurred in by Mr. Justice CROUCH, who, also, is now a Judge of the New York Court of Appeals. In that opinion it is said (pp. 189, 190):

"This clause of the policy makes clear that the general rule of insurance law requiring good faith and fair dealing applies to fraudulent statements and false swearing made by an assured after a loss. Courts have been assiduous to prevent the use of the clause to bar a recovery where the alleged fraud or false swearing was not intentional, or the false statements were matters of opinion honestly, although mistakenly, held by the assured. On the other hand, they have not hesitated to hold that a recovery would not be permitted if it clearly appeared that the assured had intentionally made false and fraudulent statements or intentionally sworn falsely. Under such circumstances it has been held that the assured was barred from recovering by the terms of the policy.

Juries are prone to disregard a defense based on the clause in question and no doubt justify such action on the ground that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. There is no justification in law for such conduct. When the insurance company establishes that the statements made were relevant, material and intentionally false it has established its defense. It is not required to assume the burden of

> convincing a jury that it has been injured by such statements. If it appears that a plaintiff has willfully and fraudulently placed in the proofs of loss a statement of property lost which he did not possess, or has placed a false and fraudulent value upon the articles which he did own, he is not entitled to recover anything."

In like manner, in *Riley* v. *Aetna Ins. Co.*, 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983 and *Hiller Co.* v. *Insurance Co. of N. A.*, 125 La. 938, 52 So. 104, the jury found for the insured for about half the amount claimed, and in each case it was held that the judgment entered upon the verdict should be reversed because of fraudulent overvaluation.

In *Levy* v. *Baillie*, 7 Bing. 349 (1831) the plaintiff made affidavit that his loss was £1085 and the jury found in his favor for £500; and defendant's rule for a new trial on the ground that such verdict "amounted in effect to a verdict for the defendants under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim" was *made absolute.*

In *McLeod* v. *Citizens' Ins. Co.*, 13 Nova Scotia 21, it was said (pp. 27, 28):

> "The second jury found a verdict for $2000, of which we must assume one-half to go for the machinery, leaving $1000 for the mill, that is, one-third of what the plaintiffs swore it was worth, and one-half of what they insured on it. This of itself is an index of fraud under the decision in Levy *v.* Baillie, 7 Bing., 349."

and judgment was there ordered for the defendant despite the jury's verdict for the plaintiff.

Each of the six cases last cited proceeds upon identically the same principle which was applied by the Circuit Court of Appeals in the case at bar, *viz.*, that the verdict itself imports a finding that there was a fraudulent overvaluation of the plaintiff's claim and thus itself establishes that the defendant, not the plaintiff, is entitled to judgment.

The same principle was applied in *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, in which the jury in a personal injury case found in *favor* of the employee-driver and *against* the employer-owner. The New York Court of Appeals there reversed the judgment entered upon such verdict against the employer-owner, and in so doing said (pp. 233-234):

> "*We think the verdict as a whole was equivalent to one finding no cause of action against the appellant.* As has already been pointed out, the only claim of liability against it was based on the alleged negligence of its employee. The primary and absolutely essential facts to be found by the jury before any liability could be visited upon the appellant were that the driver of the machine was negligent and that the plaintiff was free from negligence. * * * The appellant's liability was purely of a derivative or secondary character on the theory of *respondeat superior,* and when the jury found that the employee was free from tortious conduct or that the plaintiff was guilty of contributory negligence, *the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned,* and the verdict should have been in its favor. *There was then left no support for or consistency in a verdict against the employer.*
>
> "When the jury took its improper and unwarranted course, nevertheless, of rendering a verdict against it, a situation was presented somewhat analogous to the one which arises where inconsistent findings have been made or where a jury has found a general verdict which is inconsistent with special findings, and in determining whether the judgment is supported and authorized we think that the appellant is entitled to have applied the principles which give to an appellant the benefit of the most advantageous of the inconsistent findings (*Whalen* v. *Stuart,* 194 N. Y. 495), or which make the special findings superior in effect to the general verdict (Code, § 1188), *and thus to have the award of damages*

against it controlled by and yield to the verdict and findings that the facts did not exist which justified such an award of damages."

It was very clearly and accurately pointed out in the *Domagalski* case, *supra,* that juries are prone to disregard a defense based on fraudulent overvaluation because of a feeling on their part that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. It is quite apparent that that is what happened in the case at bar. But, as was also pointed out in that case, there is no justification in law for that course.

The facts which entitle the insurance company to judgment, viz., the fraudulent overvaluation of the claim, having been established by the verdict, the situation obviously was not one in which respondent should be forced to move for or to submit to a new trial (see authorities cited in Petition for Rehearing at R. 336, 337). On the contrary, it became the duty of the court to award the relief which the law requires upon those facts, *i. e.,* to direct that judgment upon the verdict be arrested (*Slacum* v. *Pomery,* 6 Cranch 221, 225; *Cragin* v. *Lovell,* 109 U. S. 194, 199, 200.)

II.

The result reached below is correct for the additional reason that petitioner's failure to comply with the Iron Safe Clause entitled respondent to the direction of a verdict in its favor.

Although the Circuit Court of Appeals did not place its decision upon the ground that the District Court erred in not directing a verdict for respondent, it actually granted

a rehearing as to that point (R. 343); and as the result reached by the Circuit Court of Appeals is the same as if that point had been sustained, it is here open to respondent to urge that point in support of the decision below.

Langnes v. *Green,* 282 U. S. 531, 538;
United States v. *American Railway Express Co.,* 265 U. S. 425, 435.

We conceive, too, that certiorari will not be granted if this court be convinced that the result reached below is correct upon any ground.

We hence discuss the question whether or not a verdict should have been directed.

The Iron Safe Clause requires "a complete itemized inventory of stock on hand" (R. 246). The inventory produced by petitioner concededly, and as appears from a bare inspection of it, purports to be, at most, an inventory of only the goods owned by the plaintiff (R. 296-299), whereas the policy covered, not only goods owned by the plaintiff, but, also, goods "held in trust or on commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable, or sold but not delivered" (R. 244).

The uncontroverted evidence thus establishes that petitioner did not have "a complete itemized inventory of stock on hand" as required by the policy, for upon no conceivable theory can it be held that an inventory which concededly enumerates only a part of the merchandise insured constitutes a compliance with the policy.

A partial inventory is not a complete inventory. The clause in question requires "an itemized inventory of *the stock insured*" (*Western Assurance Co.* v. *Kemendo,* 94

Texas 367, 371, 372; 60 S. W. 661), and when the inventory is not complete it is error to refuse a peremptory instruction for the defendant (*Dorroh-Kelly Co.* v. *Orient Ins. Co.*, 104 Texas 199, 202, 135 S. W. 1165; *Hanover Fire Ins. Co.* v. *Moore*, Texas , 280 S. W. 538, 540).

An inventory which does not show merchandise held for others as well as merchandise owned, where both are covered by the policy, fails to give that information as to the nature and extent of the insured stock which insurance companies all over the country for many years have found it necessary to contract for. Such failure puts the insurance company at a disadvantage in checking other information which is given. In some cases information as to property held for others would have a material bearing where other insurance is permitted or where the policy-holder is a co-insurer. In other cases it would have a material bearing as to the presence of prohibited articles, like gasoline or explosives. It is not necessary, however, for the insurance company affirmatively to show that failure to inventory the merchandise held for others actually caused it loss or damage. It is enough for the insurance company to show that the clause was not complied with (*Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462, 464, 466).

In fact, however, an inventory of the goods held for others was of the utmost importance in the case at bar because the principal business of the insured was manufacturing goods for others (R. 56, 57). The business of manufacturing for its own account started only shortly before the fire (R. 113, 135). The greater part of the merchandise at risk thus always was goods held for others.

The Iron Safe Clause also requires the insured to "keep *a set of books*, which shall clearly and plainly present *a complete record of business transacted*, including all purchases,

sales and shipments, both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy" (R. 246).

Petitioner's own bookkeeper testified "We did not carry a stock book" (R. 66). He also testified "the plaintiff corporation did not have a cash book" (R. 84).

He claimed that there was "no necessity" for a stock book because "We could determine how many yards were left of any one material at the end of any one month by making an inventory" (R. 66). But inventories were not made every month, and he expressly admitted that "there is *no way of determining from the books* how many yards of material, cloth, was used in any one month, or how many yards of thread" (R. 66, 67).

As an attempted substitute for a cash book, petitioner presented a copy of its account with its bank showing the checks issued and deposits made (R. 81). But its bookkeeper admitted that "there is no way of determining who those checks were issued to" (R. 81) and that the bank's statement "only shows the amount for which it (the check) was issued and the amounts of the deposits" (R. 81, 82). There was thus no record showing what goods had been sold.

Petitioner's own evidence thus definitely established a failure to comply with the provision of the Iron Safe Clause with respect to the keeping of books; for while that clause does not require any particular method of bookkeeping, it is well settled that the books themselves must be sufficient without the aid of oral testimony (*Home Insurance Co.* v. *Williams*, 237 Fed. 171, 176, 177).

It being thus established by petitioner's own evidence that the inventory covered only a part of the merchandise insured and that petitioner kept no cash book and no stock

book, the question whether or not there was a compliance with the Iron Safe Clause was a question of law for the Court, and it was error to leave it to the jury to say whether or not the inventory and books produced constituted a compliance (*Home Insurance Co.* v. *Williams,* 237 Fed. 171; *Houff* v. *German Ins. Co.,* 110 Va. 585, 591, 592, 66 S. E. 831; *Wright* v. *Union Ins. Co.,* 13 Fed. (2d) 612, 613, 614; *Scottish Union Ins. Co.* v. *Virginia Shirt Co.,* 113 Va. 353, 361, 362, 74 S. E. 228).

In the first opinion of Judge MORTON it is stated that the plaintiff offered the evidence of several witnesses, including an expert accountant, to the effect that its books and accounts were of such character as to afford "a reasonably complete picture" of its business activities, and that they were honestly made and kept as required by the policy (R. 325). But while it is true that the plaintiff's expert accountant made a statement very close to that indicated in the opinion (R. 42), the fact remains that that is merely the expression of an opinion by a paid expert and not the statement of a fact. His testimony as a whole makes it perfectly apparent that all he meant was that he could construct *a* statement or report of what the books showed, for he concededly had no personal knowledge of the business and hence could not know whether or not the books constituted a complete record of the business. Furthermore, Judge MORTON apparently overlooked the fact that the witness finally admitted (R. 45, 46):

> *"I can't tell how much they had in the factory because I don't know what goods were in the factory;* * * * *as far as I interpret the books I don't know what there was in the factory on the date of the fire; I don't know how much was out on the island;* I don't know what it was worth; I don't know whether the val-

uations given in the books are correct, whether they are accurate or inaccurate."

That is a specific admission, in clear words, that the books did not give the information contracted for in the clause of the policy in question, and instead of affording ground for refusing to direct a verdict it shows that such direction should have been given.

The petition for certiorari should be denied.

Respectfully submitted,

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May, 1936.

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Supreme Court of the United States

OCTOBER TERM, 1936
No. 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

against

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT

HENRI BROWN,
San Juan, P. R.,
CARROLL G. WALTER,
New York, N. Y.,
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INDEX

PAGE

Opinions Below 1

Statement of the Case 1

Questions Presented 4

Petitioner and Its Business 6

The Policy 7

The Proof of Claim 9

Evidence as to Compliance with Iron Safe Clause 10

Evidence as to Cost of Labor 12

Evidence as to What Property Was Destroyed and the Value Thereof 14

As to Machinery 15

As to Materials and Merchandise 20

ARGUMENT

I. Petitioner's own evidence establishes beyond dispute that it failed to comply with the Iron Safe Clause, and a verdict should have been directed for respondent upon that ground 22

II. Petitioner's own evidence likewise establishes that its claim was fraudulent, and for that additional reason a verdict should have been directed for respondent 31

III. The jury's verdict constitutes a finding that petitioner asserted a fraudulent claim, and under that finding it is respondent, not petitioner, which is entitled to judgment 34

Petitioner's authorities distinguished 41

Answer to dissenting opinion 43

IV. The Circuit Court of Appeals was right in directing that judgment upon the verdict be arrested.

It was not necessary for it to award a new trial 47

V. Reversible error was committed in refusing requested instructions to the jury 61

TABLE OF CASES

PAGE

American Lumber & Mfg. Co. *v.* Equitable Life Assurance Soc., 45 Fed. 2d 504 61
American Central Ins. Co. *v.* Harmon Knitting Mills, 39 Fed. 2d 21 43
Atlas Assurance Co. *v.* Hurst, 11 Fed. 2d 250 .....34, 42

Ballew *v.* United States, 160 U. S. 187 .....55, 57
Baltimore & Carolina Line *v.* Redman, 295 U. S. 654 58
Bank of Alexandria *v.* Swann, 9 Pet. 33 .....51, 60
Bowditch *v.* Boston, 101 U. S. 16 24
Buckeye Cotton Oil Co. *v.* Sloan, 250 Fed. 712 62

Camden Fire Ins. Ass'n *v.* Penick, 2 Fed. 2d 964 42
Camp *v.* Gress, 250 U. S. 308 58
Chicago, St. P., M. & O. Ry. Co. *v.* Kroloff, 217 Fed. 525 62
Columbian Ins. Co. *v.* Modern Laundry, 277 Fed. 355 34
Comegys *v.* Vasse, 1 Pet. 193 .....51, 60
Cragin *v.* Lovell, 109 U. S. 194 .....41, 58

Davis *v.* Ætna Acceptance Co., 293 U. S. 328 59
Diaz *v.* Gonzalez, 261 U. S. 102 48
Domagalski *v.* Springfield Fire & M. Ins. Co., 218 N. Y. App. Div. 187 38
Dorroh-Kelly Co. *v.* Orient Ins. Co., 104 Tex. 199; 135 S. W. 1165 ....26, 27
Douglas *v.* Edwards, 298 Fed. 229 61
Dunlop *v.* Ball, 2 Cranch 180 51

Erie R. Co. *v.* Gallagher, 255 Fed. 814 62
Everett-Ridley-Ragan Co. *v.* Traders Ins. Co., 121 Ga. 228; 48 S. E. 918 .. 29
Fenwick *v.* Sears, 1 Cranch 259 50
Fire Association of Philadelphia *v.* Hinton, Tex. Civ. App.; 298 S. W. 178 23
Fitzsimmons *v.* Newport Ins. Co., 4 Cranch 185 .....51, 60
Forged Steel Wheel Co. *v.* Lewellyn, 251 U. S. 511 47
Fort Scott *v.* Hickman, 112 U. S. 150 59

Gasoline Products Co. *v.* Champlin Co., 283 U. S. 494 59
Garten *v.* General Accident &c. Corp., 206 N. Y. App. Div. 154 23
Globe & Rutgers Fire Ins. Co. *v.* Stallard, 68 Fed. 2d 237 42
Great American Ins. Co. *v.* Roney & Verger Co., 42 Fed. 2d 816 42
Greenleaf *v.* Birth, 9 Pet. 292 62
Gunning *v.* Cooley, 281 U. S. 90 .....24, 25
Gunther *v.* Liverpool Ins. Co., 134 U. S. 110 .....26, 41

Hanover Fire Ins. Co. *v.* Moore, 280 S. W. 538 28
Herbert *v.* Butler, 97 U. S. 319 24
Hermanos *v.* Royal Exchange Assurance Co., 277 U. S. 590 41
Hiller Co. *v.* Insurance Co. of N. A., 125 La. 938; 52 So. 104 39
Home Ins. Co. *v.* Williams, 237 Fed. 171 ..... 22, 26, 28
Hooe *v.* Groverman, 1 Cranch 214 .....51, 60
Howard *v.* Railway Co., 101 U. S. 837 24

PAGE

Houff *v.* German Ins. Co., 110 Va. 585, 66 S. E. 834 26
Hughes *v.* Mohr, 7 Cranch 176 51

Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452 27
Improvement Co. *v.* Munson, 14 Wall. 116 24
Insurance Companies *v.* Boykin, 12 Wall. 433 ..... 52, 56
Insurance Co. *v.* Piaggio, 16 Wall. 378 ..... 53, 56
Insurance Companies *v.* Weides, 14 Wall. 375 41

Langnes *v.* Green, 282 U. S. 531 4
LaRoche *v.* Jones, 9 How. 155 51
Larocque *v.* Dorsey, 299 Fed. 556 61
Levy *v.* Baillie, 7 Bing. 349 39
Lewis *v.* Harwood, 6 Cranch 82 51
London Assurance Corp. *v.* Poole, 212 Ala. 109; 101 So. 831 23

Mack *v.* Lancashire Ins. Co., 4 Fed. 59 42
Mandeville *v.* Riddle, 1 Cranch 290 50
Mandelthord *v.* Union Indemnity Co., 31 Ohio App. 423; 167 N. E. 480 23
Marine Ins. Co. *v.* Young, 1 Cranch 332 50
McCool *v.* Smith, 1 Black 459 ..... 51, 60
McGuire *v.* Blount, 199 U. S. 142 24
McLeod *v.* Citizens Ins. Co., 13 Nova Scotia 21 39
Mount Adams & E. P. Ry. Co. *v.* Lowery, 74 Fed. 463 24
Merchants Ins. Co. *v.* Johnson, 135 Miss. 311; 99 So. 899 23
Mosheuvel *v.* District of Columbia, 191 U. S. 247 26

National Fire Ins. Co. *v.* Renier, 22 Fed. 2d 671 42
New York Underwriters Fire Ins. Co. *v.* Malhan & Co., 25 Fed. 2d 415 22

Orenstein *v.* Star Ins. Co., 10 Fed. 2d 754 34
Otis *v.* Walter, 11 Wheat. 192 ..... 51, 60

Page *v.* Bank of Alexandria, 7 Wheat. 35 51
Pangburn *v.* Buick Motor Co., 211 N. Y. 228 ..... 40, 44, 45, 46, 59, 60
Patton *v.* Texas & Pac. Ry. Co., 179 U. S. 658 31
Pennsylvania R. R. Co. *v.* Chamberlain, 288 U. S. 333 ..... 24, 25
Pennsylvania Fire Ins. Co. *v.* Malone, 217 Ala.; 115 So. 156 23
Phoenix Ins. Co. *v.* Sherman, 110 Va. 435; 66 S. E. 81 22
Pleasants *v.* Fant, 22 Wall. 116 24

Realty Co. *v.* Montgomery, 284 U. S. 547 57
Riley *v.* Ætna Ins. Co., 80 W. Va. 236; 92 S. E. 417; L. R. A. 1917 E. 983 39

Scottish Union Ins. Co. *v.* Virginia Shirt Co., 113 Va. 353; 74 S. E. 228 .. 22, 29
Slacum *v.* Pomery, 6 Cranch 221 41
Slocum *v.* New York Life Ins. Co., 228 U. S. 364 47
Small, A. B. *v.* Lamborn & Co., 267 U. S. 248 ..... 24, 25, 41
Southern Pacific Co. *v.* Poole, 160 U. S. 438 26
Southern Ry. Co. *v.* Walters, 284 U. S. 190 ..... 25, 47
Spring Gardens Ins. Co. *v.* Amusement Syndicate Co., 178 Fed. 519 42
Sternfeld *v.* Park Fire Ins. Co., 50 Hun 262 36

Thomson *v.* Jameson, 1 Cranch 282 50

PAGE

Upton v. Tribilcock, 91 U. S. 45 26
United States v. American Ry. Exp. Co., 265 U. S. 425 4
United States v. Cantrill, 4 Cranch. 167 51
Victor American Fuel Co. v. Peccarich, 209 Fed. 568 59
Walker v. Southern Pac. R. R., 165 U. S. 593 ..... 59, 60
Western Assurance Co. v. Kemendo, 94 Tex. 367; 60 S. W. 661 26
Western & Atlantic R. R. v. Hughes, 278 U. S. 496 24
Wilmington Mining Co. v. Fulton, 205 U. S. 60 62
Wilson v. Lenox, 1 Cranch 193 50
World's Columbian Exposition Co. v. Republic of France, 91 Fed. 64 45
Wright v. Union Ins. Co., 13 Fed. 2d 612 29

Supreme Court of the United States

October Term, 1936
No. 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

against

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

Opinions Below.

The first opinion of the Circuit Court of Appeals is reported in 77 Fed. 2d 891. Its opinion on reargument is reported in 81 Fed. 2d 385.

Statement of the Case.

Petitioner brought suit against respondent in the District Court of the United States for Puerto Rico upon a policy of fire insurance for $30,000 issued by respondent on *February 9, 1932* (R. 1-4). It claimed a total loss from a fire occurring *March 13, 1932,* and claimed that the property destroyed was worth $35,926.06 (R. 3, 252, 259).

Respondent defended upon the ground that the policy had been forfeited by the making of false declarations and fraudulent claims thereunder (R. 6-8) and by failure to comply with the Iron Safe Clause (R. 8, 9).

At the close of all the evidence, respondent moved for the direction of a verdict in its favor (R. 11, 12-14). That motion was denied and an exception noted (R. 11). The jury returned a verdict in the following form: *"We, the jury, find for the plaintiff and assess its damages in the sum of $17,000 plus interest at 6 per cent"* (R. 12). The District Court "ordered that judgment in accordance with the verdict of the jury be entered" (R. 24), and a judgment that petitioner recover of respondent $17,000 with interest and costs was then entered (R. 23, 24).

Respondent appealed, and assigned as error

(a) The refusal to direct a verdict because of failure to comply with the Iron Safe Clause (R. 25);

(b) The refusal to direct a verdict upon the ground that it appeared from the evidence as matter of law that the claim presented was false and fraudulent (R. 25, 26);

(c) The refusal of the court to instruct the jury that there was no evidence from which "cost of labor", which was one item of the claim, could be determined (R. 26);

(d) The refusal of the court to instruct the jury that there was no evidence from which it could determine the market value of merchandise claimed to have been sold by petitioner's president to petitioner and that petitioner could not recover for the loss of the merchandise so sold (R. 26);

(e) The verdict and judgment are contrary to law (R. 26).

Upon the first hearing before it, the Circuit Court of Appeals affirmed the judgment of the District Court (R. 340). It held that the questions as to fraud and compliance with the Iron Safe Clause were for the jury and that the jury were properly instructed, and *refused to consider* the contention that the verdict and judgment were contrary to law. As to that contention, it said (R. 317, 318; 77 Fed. 2d 893):

> "As to the tenth assignment of error, the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. *The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent overvaluation by the plaintiff in the proof of loss.* Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it."

A petition for rehearing (R. 319-332) was afterwards granted (R. 340); and after a reargument the Circuit Court of Appeals vacated its order affirming the judgment of the District Court and also vacated the judgment of the District Court and remanded the cause to that court with directions to enter an order in arrest of judgment (R. 341).

In the opinion delivered upon the reargument the court held that no motion or exception was necessary to present any error appearing upon the face of the "record proper", which, it said, consisted of the complaint (including the

proof of loss and policy which were made a part thereof) and the verdict and judgment (R. 333, 334). It then held that the verdict itself established fraud as a matter of law because it found that property which petitioner had sworn was worth $35,926.06 was worth only $17,000 (R. 334, 336). It then also held that in considering the motion for a directed verdict it might consider the evidence (inasmuch as it had been made a part of the record by a bill of exceptions) and that such evidence conclusively established fraud with respect to the item of cost of labor on goods in process of $2,524.50 (R. 336). The question as to compliance with the Iron Safe Clause was not adverted to.

There was a dissenting opinion by the Judge who had written for the court upon the first hearing (R. 337).

Certiorari was later granted by this court.

Questions Presented.

It is settled that it is open to respondent to defend and sustain the final decision of the Circuit Court of Appeals upon any of the grounds which were urged in that court in opposition to the judgment of the District Court, regardless of whether the Circuit Court of Appeals sustained or rejected those grounds (*Langnes* v. *Green,* 282 U. S. 531, 538, 539; *United States* v. *American Ry. Exp. Co.,* 265 U. S. 425, 435).

We therefore shall here argue each of the questions presented by the assignments of error as set out at page 2, *supra;* and we call particular attention to the great and general importance of the question whether respondent was entitled to a directed verdict because of failure to comply with the Iron Safe Clause. That question is important because it affects perhaps every existing policy in

this country covering a stock of merchandise, and, also, because the Circuit Court of Appeals for the First Circuit, as we believe, is not following the rule laid down by this court with respect to when verdicts should be directed.

A more particular formulation of the questions is as follows:

1. Where the insured's own evidence shows that his inventory lists only merchandise owned, and not merchandise held for others (the policy covering both classes), and that his books are not such as to permit a determination therefrom as to what stock was on hand at the time of the fire, is there not such a failure to comply with the Iron Safe Clause as entitles the insurer to the direction of a verdict?

2. Where the policy provides that all benefit under it shall be forfeited if the claim be in any respect fraudulent, and the insured's own evidence shows that some, at least, of the books and records produced in support of his claim could not be genuine, and that some, at least, of the testimony offered in support of his claim is false, is not the insurer entitled to the direction of a verdict?

3. Where the property insured and destroyed is of an ordinary nature, having no unique qualities, and is being used in the insured's business, and the insured asserts that it is worth $35,926.06 and claims the total face of the policy of $30,000, and the jury finds that the property destroyed is worth only $17,000, does not the verdict itself establish that the claim is fraudulent and, therefore, that the insurer, not the insured, is entitled to judgment on such verdict?

4. Where the Circuit Court of Appeals finds that a verdict does not support the judgment which the District Court has entered upon it, and, on the contrary, supports

only a judgment for the opposite party, can the Circuit Court of Appeals direct the entry of an order in arrest of judgment, or must it award a new trial?

5. Where there is no evidence to sustain a particular part or portion of a claim, is not the court bound, upon request, to grant an instruction to that effect?

Petitioner and Its Business.

Petitioner was organized in 1929 and took over an existing business of Jose Rivera Soler, who at all times was its president, principal stockholder and manager (R. 105, 96). Its total capital is $10,000 (R. 288).

Petitioner's business, at least until a month before the fire, was that of manufacturing and embroidering children's clothes, tablecloths, towels, and similar articles, the materials for which, except the thread, were sent to it by dealers in the United States and belonged to such dealers and not to petitioner (R. 55, 56, 111, 133). It manufactured some *remnants* for its own account, but never bought materials to manufacture for its own account (R. 111, 133). Some of the work was done on machines in petitioner's factory, but large quantities of materials were sent out to be sewed and embroidered in the homes of operatives (R. 43, 67, 149-152).

In February, 1932—the month in which the policy was issued—all the shares of petitioner's capital stock, except those held by Rivera Soler, were purchased by I. L. Berrios Berdecia, who became treasurer. Those shares had been acquired by three other individuals in June or July, 1931, for $5,000 (of which $3,000 was paid in cash and $2,000 in machinery, furniture and accessories) and were sold in February 1932 by those three individuals to I. L. Berrios Berdecia for $2,500 because there were no profits in the

business and because they had had some differences with Rivera Soler (R. 133).

At the time of the fire petitioner had accounts receivable of $769.99, and 57 cents in cash (R. 35).

The Policy.

The policy insured against loss and damage by fire, in the amounts specified, the following property (R. 240, 241):

$15,000.00: On stock of *merchandise,* unembroidered, embroidered and in the process of being embroidered, or for repairs, and on *cost of labor* performed thereon, including all *materials,* ingredients and supplies used in the manufacturing, and repairing the same, including boxes, samples and packages, *the property of the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable,* or sold but not delivered all while contained in the two-story concrete building with zinc roof, situated at Pumarada St. #4, block #657, of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00: On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$ 3,000.00: On furniture, fixtures, including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00: Total.

Condition "12" of the policy provides (R. 248):

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; * * * all benefit under this policy shall be forfeited."

The Iron Safe Clause is as follows (R. 243):

"1st. The Assured will take a *complete itemized inventory of stock on hand* at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date and upon demand of the Assured the unearned premium from such date shall be returned.

2nd. The Assured will keep *a set of books,* which shall clearly and plainly present *a complete record of business transacted,* including all *purchases, sales* and *shipments,* both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy.

3rd. The Assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times, when the building mentioned in this policy is not actually open for business; or failing in this, the Assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void."

The Proof of Claim.

The policy required that, in the event of loss, the insured should submit a written claim setting forth the items of property damaged or destroyed and the amount of the loss "having regard to their value at the time of the loss or damage, not including profit of any kind" (R. 247).

The claim presented by petitioner pursuant to that requirement is Exhibit 16 (R. 252-259). In this claim petitioner stated that the objects specified therein were owned by it; that they were damaged or destroyed to the extent stated (*i. e.*, totally); and that the cash value of such objects "is as expressed in said statement taking in consideration their value at the time of the fire, without including any profit" (R. 252).

The first item set out in the claim is as follows (R. 253):

"First Item:

Printing and office supplies---	$ 141.35	
Raw materials for production	9,440.64	
Manufactured and unmanufactured goods ----------	4,838.72	
Labor on goods in process----	2,524.50	
Drawn and perforated patterns ----------	400.00	
Total on the day of the fire---	$17,345.21	
Value of the salvage 'total Loss' ----------	0.00	
Total of the loss----------	17,345.21	
Amount insured under this item of the Policy No. 13380----	$15,000.00	
Amount claimed under this item---------		$15,000.00"

The claim also gives a detailed list of articles claimed to be covered by the second and third items of the policy

(machinery and accessories, and furniture, tools, implements). (R. 253-255.)

The loss under item 2 is stated to be $14,835.10, and the full amount insured of $12,000 is claimed (R. 253, 254).

The property listed under item 3 as totally destroyed is valued at $3,745.75, and the full policy coverage of $3,000 is claimed (R. 254, 255).

Evidence as to Compliance with Iron Safe Clause.

The inventory produced by petitioner concededly, and as appears from a bare inspection of it, purports to be, at most, an inventory of only the goods owned by petitioner. No inventory of goods held in trust or on commission or consignment or joint account or on storage was produced, and there is no evidence that any inventory of such goods was kept.*

Petitioner's bookkeeper, Wolf, made the general statement that the books he produced contained a complete record of the business transacted by petitioner, including all purchases and sales and shipments (R. 33). Its expert accountant, Gorbea, also made the general statement that the books were a complete record of the business (R. 40). *But each of those witnesses afterwards gave definite and specific testimony precisely to the contrary.*

Petitioner's bookkeeper testified (R. 65):

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*The inventory book was marked Exhibit 4 for Identification at R. 31. It was then admitted in evidence, along with other books, for the limited purpose of showing compliance with the Iron Safe Clause at R. 34. It was then admitted generally at R. 45-47. It is not printed in the transcript but was physically transmitted to the Circuit Court of Appeals (R. 311-313). A copy of the inventory of December 31, 1931, as contained in that book, was produced by petitioner's witness, Simon Rojas Negron, and upon his cross-examination that copy was marked as Respondent's Exhibit 5 for Identification (R. 123, 124). That copy was then received in evidence as Respondent's Exhibit 15 at R. 232, 233, and it is printed at R. 291-293.

> *"We did not carry a stock book,* * * *; there is no way of determining from the books* how many yards of material, cloth, was used in any one month, or how many yards of thread; I cannot tell; we had, for instance, a certain amount of thread on hand, and from that amount we used thread for all purposes."

He also testified (R. 83):

> *"The plaintiff corporation did not have a cash book;* * * *."*

He claimed that there was "no necessity" for a stock book because "we could determine how many yards were left of any one material at the end of any one month by making an inventory" (R. 65). But he admitted that inventories were not made every month and that there was "no way of determining from the books" how much material had been used (R. 65).

As an attempted substitute for a cash book, petitioner presented a copy of its account with its bank as obtained from the bank after the fire (R. 79, 80), the original bank statements and cancelled checks having been destroyed because not kept in the safe (R. 80). But its bookkeeper admitted that "there is no way of determining whom those checks were issued to" (R. 80), and that the bank's statement "only shows the amount for which it (the check) was issued and the amounts of the deposits" (R. 80). There was thus nothing to show the source from which the cash was derived or the purpose for which the checks were issued.

Neither were there any books or records from which there could be determined the amount of materials which at the time of the fire were in the homes of operatives to be worked upon (R. 120, 121, 225, 226), although there were times when material was being sent out to 40 or 50 or 60 different people (R. 68).

Gorbea, the accountant, merely examined the books after the fire and concededly had no personal knowledge of the business (R. 35, 37, 39) and hence could not know whether or not the books constituted a complete record of the business, and he did not pretend that the books showed what stock was on hand. His testimony as to what the books showed was, not that the books showed so many yards or dozens of specific articles, but merely that they contained entries of lump sums for unspecified quantities of general classes of articles (R. 35, 36, 41), and when asked by a juror whether there was a stock book which would show the amount of merchandise on hand on the day of the fire, he stated directly and specifically: *"Well, that cannot be done"* (R. 41). He also testified (R. 44):

> *"I can't tell how much they had in the factory* because I don't know what goods were in the factory; the letter that I have mentioned was about the statement of their account to the last day; *as far as I interpret the books I don't know what there was in the factory on the date of the fire; I don't know how much was out on the island;* I don't know what it was worth; *I don't know whether the valuations given in the books are correct, whether they are accurate or inaccurate."*

Evidence as to Cost of Labor.

As noted above, the first item of the policy covered *cost of labor* as well as merchandise and materials (R. 240; *supra,* p. 7), and in its proof of claim petitioner claimed $2,524.50 for "Labor on goods in process" in addition to $9,440.64 for raw materials for production and $4,838.72 for manufactured and unmanufactured goods (R. 253; *supra,* p. 9). As also noted above, the proof of claim expressly stated, as required by the policy, that no profit was included (R. 252; *supra,* p. 9).

The testimony of petitioners' president, Rivera Soler, is plain and explicit, however, to the effect that the item of $2,524.50 was not for labor nor for the cost of labor, but, on the contrary, was the contract price of manufactured merchandise and included profit and overhead expense. At R. 110 he testified:

> "the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; *no, in that item there is included only the price that we collected from the people in New York;* that is to say, if my *contract price* was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozens of those on hand, that $7.50 was insured."

Also at R. 116, 117:

> "my company is not claiming for this material that belonged to somebody else from the defendant company, we have calculated what we have paid for labor on that; *not for labor, but what we collect or charge for labor and for the loss of our silk; I am not claiming from the defendant company the money that I have paid to the employees for working this material;* I calculate that when a lot of material is finished, we are unable to charge only what we have paid for the work, because that is material that is already finished and ready for shipment, and all the overheads are incurred upon those goods, and if for a dozen garments we are paid $24 to make them, I in my calculations put there $24; it may be that I have paid $2 for that, but it is worth $24 to me; I *include the cost of labor, the overhead expenses and my profit,* the article being finished and ready for shipment at the time of the fire."

Evidence as to What Property was Destroyed and the Value Thereof.

The evidence upon this subject consisted of (a) certain books which it was claimed showed what property petitioner had acquired and disposed of,* and (b) testimony by certain officers of petitioner that the property shown by the books was in the factory at the time of the fire and that everything in the factory was destroyed.

The incompleteness of the books in certain respects already has been shown by what we already have said (pp. 10-12, *supra*). Their utter lack of trustworthiness is shown by other evidence now to be mentioned.

The book which was produced as petitioner's ledger (R. 31; Ex. 1) contains entries which are dated as early as March, 1929, but which admittedly were made by a bookkeeper, Wolf, who did not enter petitioner's employ until 1930 (R. 59, 60). Another bookkeeper, Garcia, opened a set of books for petitioner in 1929, but this ledger was not among those which he opened (R. 237-239). The book thus obviously and indisputably, and according to petitioner's own witnesses, was written up at some date considerably subsequent to the time as of which it purports to speak; and there is evidence that petitioner purchased a ledger in March 1932 (R. 70). The index tabs on the book are new, and do not bear evidence of having been used from 1929 to 1932 (R. 189, 190). The index page for the letters A to C is written twice (R. 190)—a natural error for one constructing a book, but a most unnatural thing to occur in a book in which entries are being made in the regular course of business. The item next succeeding the entry of December 31, 1930, originally was entered as January 1, 1932, and the figure *1* was then put

*After being admitted for a limited purpose at R. 34, the books and some other records were admitted generally at R. 45-54.

over the *2* so as to change 1932 to 1931 (See Ex. 1, p. 1)—another clear indication that the book was written up in 1932 (See R. 191). The absence of pencil footings at the end of each month is another indication that the book was not kept in the usual course of business (R. 190) *.

The book produced as petitioner's inventory book (R. 31; Ex. 4) is of the same general type and appearance as the ledger. It contains no inventory for 1929, but contains inventories for December 31, 1930, and December 31, 1931, in very perfect style.

So much for the books themselves. Now as to their contents.

As to Machinery.

The machinery account, at page 1 of the ledger (Ex. 1), opens with a credit of $3,286.50 under date of March 1, 1929. There is no further entry during 1929, and no closing of the account at the end of 1929. Under date of December 31, 1930, the balance is entered as $4,951—which corresponds exactly with the inventory of the same date as it appears in Exhibit 4. The principal additions during 1931 are $2,253.68 on March 20 and $7,522.45 on July 13. According to the ledger, therefore, the principal items making up the $14,835.10 claimed in the proof of loss as the value of the machinery destroyed (R. 253, 254) are:

On hand December 31, 1930	$4,951.
Acquired March 20, 1931	2,253.68
Acquired July 13, 1931	7,522.45
	$14,727.13

*The references to R. 189, 190, 191, are to the testimony of a witness called by respondent, but it is to be carefully noted that that witness was merely reciting, for the convenience of court and jury, what he observed about petitioner's books which had been put in evidence by petitioner. The evidence relied on is the books themselves, and thus in petitioner's evidence and not respondent's evidence.

The total of those three items is three cents more than the amount of machinery shown in the inventory of December 31, 1931 (R. 291, 292). It is $107.97 less than the $14,835.10 claimed in the proof of loss (R. 253, 254), and it is of considerable significance that to arrive at the total of $14,835.10 claimed in the proof of loss it is necessary to include an item of $91.75 which was entered in the ledger under date of March 18, 1932 (Ex. 1, p. 1), which was five days after the fire.

Passing those discrepancies, we turn to the testimony as to the three principal items tabulated above.

Rivera Soler testified that when petitioner was organized he sold to it about 14 Singer sewing machines and a cutting machine which he had when engaged in business on his own account (R. 105). He was unable to say, however, from whom he had purchased those machines or how much he had paid for them (R. 105), and no other evidence upon that point was adduced. He also testified that later on he individually purchased around 24 or 28 machines from Dolcey & Company for $1,400 and then sold those machines to petitioner for $2,253.88 (R. 106, 115)—which obviously is the above tabulated item of $2,253.68 recorded in the ledger under date of March 20, 1931.* Those machines had been purchased by Dolcey from the Singer Sewing Machine Company in January 1928—more than four years before the fire—for not over $2,100 (R. 142, 143).

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*Petitioner's bookkeeper, Wolf, testified that the ledger entry of $2253.68 of March 20, 1931, represented machinery purchased by Rivera Soler from Dolcey (R. 61). He also referred to an invoice which, he said, showed that on *January 14, 1931*, Rivera Soler personally purchased from Dolcey 26 machines and some other articles which totalled $2253.68 (R. 62), but he also said that he did not know what business Rivera Soler had with Dolcey, that Rivera Soler told him to pay Dolcey only $1400, and that the matter could be explained by Rivera Soler (R. 62). Rivera Soler's testimony as given in the text hence must be accepted as the true account, and that testimony demonstrates that he claimed $2,253.68 as the value in 1932 of second hand machines which he knew he had purchased in 1931 for $1400.

The only other machines mentioned by Rivera Soler upon his direct examination as having been acquired by petitioner were those which he said were brought into the corporation by "Escudero, Valloveras and I don't remember the name of the other" (R. 98), and he specifically stated that when those additional machines were so brought in there was an appraisal of *all* the machines and that a memorandum of the machines and prices was made (R. 98). That memorandum subsequently was offered in evidence by petitioner (R. 107), and it shows that the total, not only of the machines, but, also, of the furniture, brought in by *all* the parties, was $9,869.92, of which $7,869.92 was credited to Rivera Soler and $2,000 was credited to Escudero, Valloveras, and Pumarada (R. 279, 280). Rivera Soler then further testified (R. 98):

> "Besides the machines that I have already described (original purchase of 14 machines, Dolcey machines, and those brought in by Pumarada, Valloveras and Escudero) *there were no other machines acquired by the corporation or sold by me to the corporation;* it may be that there were, because there might have been some machines that were purchased specially, but really I don't believe there were any."

The time when Escudero, Valloveras, and Pumarada came into the corporation was July, 193 (R. 107, 131), and the above mentioned memorandum of the appraisal then made thus *demonstrates the falsity of the ledger entry showing additional acquisitions of $7,522.45 on July 13, 1931.*

Rivera Soler then *changed his prior testimony* and stated that he purchased additional machines after the purchase of the Dolcey machines (R. 106). He then made that more specific by saying "and then in July, 1931, I sold the

corporation more machinery for $7,500'' (R. 115). When pressed for details as to this large purchase and sale—larger than the combined acquisitions of machinery as to which he previously had testified—he said (R. 115):

> ''the machinery that I bought some time shortly before July, 1931, that I had in my house in Guaynabo, and that I sold to the corporation, was bought by me on two or three occasions; I didn't buy it all at once, and I also bought some here in Puerto Rico; in Mayaguez I purchased some ordinary sewing machines; this machinery was special rebuilt machines that I bought in New York, and I bought some up there which were not rebuilt machines either; I am referring to the machinery that I sold to the corporation in July, 1931; *I am unable to state where and when I bought it;* I have machines on hand right now that if you ask me where I bought them I could not tell you; I would invite the jury to go to my house to see if I carry any system of books, and I am doing a big business right now; as to whether I buy machines for a value of $7,500 and don't know where or when I bought them, I have bought them on different occasions.''

The ledger entries of $2,253.68 under date of March 20, 1931, and of $7,522.45 under date of July 13, 1931, are further impugned by the fact that they purport to be substantiated by Vouchers Nos. 829 and 1023 respectively, and those vouchers are upon a printed form which did not come into use until November, 1931. That is to say, all vouchers preceding No. 829, and all vouchers succeeding it down to Voucher No. 1173, are on forms provided by Real Hermanos and bear their printed name and job number, except that Nos. 829 and 1023 are on forms which do not bear that name or job number and which are identical in form with vouchers subsequent to No. 1173 (R. 193, 194, 195).

We may even disregard these plain indications of fraud, however, for even Rivera Soler's changed testimony makes no claim of any additional purchases of machinery *after July 13, 1931,* when Escudero, Valloveras, and Pumarada came into the corporation (R. 107, 131), and the memorandum of the appraisal which was then made thus definitely and conclusively establishes the falsity of the inventory of December 31, 1931 (R. 291, 292) and of the proof of loss (R. 253, 254) because it shows that the value of all the machinery plus some other articles was only $9869.92 (R. 280) whereas the inventory sets forth the value of the machinery at $14,727.10 (R. 292) and the proof of loss states its value at $14,835.10 (R. 254).

So, too, the falsity of the ledger entry showing machines on hand on December 30, 1930, at $4951 is demonstrated by Rivera Soler's testimony that the only machines acquired to that date were the 14 sewing machines and one cutting machine which he sold to petitioner upon its organization (*supra,* pp. 16, 17). As he paid Dolcey only $1400 for 24 or 28 similar machines in 1931, the 14 which he sold to petitioner upon its organization obviously could not have been worth $4951 and he obviously knew they were not worth that amount.

There is also other uncontradicted evidence of palpable padding. For example:

The 22W100 machine is obsolete (R. 144, 145), and yet it is listed in the proof of loss at $172 (R. 254).

The 112W115 machine sells new for $161.25 (R. 144), and yet two are listed in the proof of loss at $410 (R. 254).

The 51-10 machine sells new for $51.25 (R. 145) and is listed in the proof of loss at $140 (R. 254).

Transmissions are part of the power table (space for benches) and they, together with shaft and belting, are included in the selling price new of $19.50 (R. 145), and yet

the proof of claim lists 86 spaces for benches at the selling price new of $19.50 and then separately lists 85 transmissions at an additional $595 and shafts at an additional $96 and belting at an additional $43.50 (R. 254).

As to Materials and Merchandise.

The evidence makes it impossible to distinguish accurately between these two items—a result which flows from the failure to comply with the Iron Safe Clause. The proof of claim values one at $9440.64 and the other at $4838.72 (R. 253), which is a total of $14,279.36. The inventory of December 31, 1931, values one at $2324.74 and the other at $5334.40 (R. 293), which is a total of $7,659.14. The ledger, as of the same date, shows materials at only $800 (Ex. 1, p. 5) and merchandise left over (sobrantes) at only $1379.75 (Ex. 1, p. 27), which is a total of only $2179.75.

To justify the claim made in the proof of loss, Rivera Soler testified to a purchase by himself of a large quantity of thread and to another large purchase of silk and broadcloth (R. 111).

As to the thread, he said he purchased a considerable quantity in New York in December 1931 or January 1932 (R. 111) and then sold it to petitioner in February 1932 (R. 113). He said he was unable to state what the thread cost him, but said that he sold it to petitioner at a price higher than he paid for it (R. 111). He also said that he brought the thread from New York in his stateroom as baggage and that he paid no excise tax upon it (R. 113). According to the entry in the ledger and the supporting voucher, however, this thread was supplied by Soler to petitioner *up to December 31, 1931* (Ex. 1, p. 5; Voucher No. 1266). If that be so, it must be included in, and is not to be added to, the $2,324.74 listed in the inventory of that date (R. 293).

As to the silk and broadcloth, Rivera Soler testified that he bought it "from somebody by the name of Nieva, in Mayaguez" for something over $6,200 (R. 111). He says the sale was on credit although he never had done business with Nieva before (R. 111) and that he brought a "considerable amount" of the silk from Mayaguez in his own automobile (R. 112). It had not been paid for at the time of the fire (R. 111, 112) and there is no evidence that it all had been delivered at the time of the fire.

The silk was credited to Rivera Soler at $6,338.34 under date of March 12, 1932 (Ex. 5, account of Jose Rivera Soler), which was the day before the fire. The voucher which purports to support the entry is No. 1280. That voucher, however, is merely a bookkeeper's memorandum to which are attached 4 sheets of paper on the letterhead of Pedro N. Nieva which purport to be invoices dated February 6, 13, 21 and 27, 1932, totalling $6,116. The voucher gives the correct total of three of the invoices but does not coincide with the fourth invoice with respect either to price or amount of goods purporting to be covered by it. Incidentally, the voucher also shows that Nieva was an automobile agent.

The records of the Treasury Department of Puerto Rico do not show the payment of the tax which should have been paid if there in fact had been a sale from Nieva to Rivera Soler (R. 138, 180). When Nieva was asked to pay a tax on such a sale, he visited the revenue agent and asked "What it was all about" (R. 141). He was not called as a witness to establish the sale.

Apart from the invoices above mentioned, there is no evidence as to the value of the goods.

POINT I.

Petitioner's own evidence establishes beyond dispute that it failed to comply with the Iron Safe Clause, and a verdict should have been directed for respondent upon that ground.

The Iron Safe Clause is of great importance to all insurance companies. It is found in every policy upon a shifting stock of merchandise, it is reasonable and fair, and enforcement of it is necessary to prevent frauds and impositions upon insurers.*

The clause requires "a complete itemized inventory of stock on hand" and "a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit" (R. 243). It requires that such inventory and books be kept in a safe or in some place not exposed to fire, and it provides that failure to produce such books and inventory shall cause the policy to be void (R. 243).

The plain purport and intent of the clause is that after a fire an exact determination of just what the insured merchandise consisted of at the time of the fire can be made by taking the inventory and then adding the subsequent purchases and deducting the subsequent sales recorded in the books; and the settled construction of the clause is that the inventory and books must be such that that determination can be made *from the inventory and books themselves,* unaided by oral testimony except testimony as to the method of keeping the records (*Home Ins. Co.* v. *Williams,* 237 Fed. 171, 176, 177; *New York Underwriters' Fire Ins. Co.* v. *Malhan & Co.,* 25 Fed. 2d 415, 421;

*Phoenix Ins. Co. v. Sherman, 110 Va. 435, 438, 439, 66 S. E. 81; Scottish Union Ins. Co. v. Virginia Shirt Co., 113 Va. 353, 361, 74 S. E. 228.

London Assurance Corp. v. *Poole,* 212 Ala. 109, 101 So. 831; *Merchants Ins. Co.* v. *Johnson,* 135 Miss. 311, 99 So. 899; *Pennsylvania Fire Ins. Co.* v. *Malone,* 217 Ala. 168, 115 So. 156, 56 A. L. R. 1075; *Fire Association of Philadelphia* v. *Hinton* (Tex. Civ. App.), 298 S. W. 178; *Mandelthord* v. *Union Indemnity Co.,* 31 Ohio App. 423, 167 N. E. 480; *Garten* v. *General Accident &c. Corp.,* 206 N. Y. App. Div. 154, 157, 158).

In the case at bar, petitioner's own witnesses, its bookkeeper and accountant, *specifically admitted that such determination could not be made from the books kept and produced by petitioner,* and the conceded absence of a stock book or cash book demonstrates that such admission was necessary (pp. 11, 12, *supra*). The utmost that the books show are lump sums for unspecified quantities of general classes of goods, without any itemization of quantities by which the sums can be checked. So, too, petitioner's inventory obviously was not complete because it does not list merchandise held for others (p. 10, *supra*).

Despite that condition of the evidence, the Circuit Court of Appeals held that whether or not the clause had been complied with was a question for the jury, its statement upon that point being as follows (R. 317; 77 Fed. 2d 892):

> "The plaintiff offered the evidence of several witnesses, including an expert accountant, to the effect that its books and accounts were of such character as to afford a reasonably complete picture of its business activities, that they were honestly made and kept as required by the policy, and that the proofs of loss conformed to the books and were honest. While the defendant introduced a good deal of evidence to the contrary through witnesses who testified that the books and records were incomplete and insufficient, and not properly kept, and showed clear indications

of having been fabricated, the questions were plainly for the jury to determine."

The Circuit Court of Appeals thus did either one of two things. It either (a) overlooked the fact that the inventory *put in evidence by petitioner* concededly does not list merchandise held for others and the fact that *petitioners' own witnesses* specifically and unequivocally admitted the incompleteness of the books, or (b) it regarded the general statements of petitioner's witnesses that the books were complete as sufficient evidence to justify a finding that the clause had been complied with *despite the subsequent specific admissions by the same witnesses that their general statements were not correct.* In either aspect, the Court clearly erred.

The settled rule is that it is the province of the court to decide whether a plaintiff has given evidence *sufficient to support a verdict in his favor,* and if he has not then it is *the duty of the court to direct a verdict against him* (*Pleasants* v. *Fant,* 22 Wall. 116, 120-122; *Improvement Co.* v. *Munson,* 14 Wall. 442, 448; *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Howard* v. *Railway Co.,* 101 U. S. 837, 844; *McGuire* v. *Blount,* 199 U. S. 142, 148; *Western & Atlantic R. R.* v. *Hughes,* 278 U. S. 496, 498; *Gunning* v. *Cooley,* 281 U. S. 90, 93, 94; *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 343).* The existence of *some* evidence in the plaintiff's favor is not sufficient to take a case to the jury; the evidence must be *legally sufficient to support a verdict* (Cases just cited; *Herbert* v. *Butler,* 97 U. S. 319, 320; *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 254). "The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed,

*See, also, the able discussion and collection of authorities by Mr. Justice LURTON, as Circuit Judge, in *Mount Adams and E. P. Ry. Co.* v. *Lowery,* 74 Fed. 463, in the opinion in which TAFT, *C. J.*, concurred.

necessarily requires a submission to the jury has met with express disapproval in this jurisdiction as in many others'' (*A. B. Small Co.* v. *Lamborn & Co., supra*). Even where there is conflicting evidence, the court nevertheless should direct a verdict where the evidence is ''so overwhelmingly on one side as to leave no room to doubt what the fact is'' (*Gunning* v. *Cooley,* 281 U. S. 90, 94).

The statements by Wolf and Gorbea that the books were complete (R. 33, 40) are, at best, merely their own inference or conclusion and not testimony as to a fact, and they thus have no greater force than the statements which in *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 340, were held to be insufficient to take a case to the jury. Furthermore, after making those general statements, Wolf and Gorbea each gave specific and detailed testimony showing that the books were *not* complete (*supra,* pp. 10-12); and under *Southern Ry. Co.* v. *Walters,* 284 U. S. 190, 194, a verdict should have been directed because their own admissions thus show that their general statements ''have no adequate foundation.''*

Even if regarded at all, those general statements certainly are not more than a *scintilla* or *modicum* of evidence which is wholly swept away by their detailed statements to the contrary; and such general statements, when opposed by detailed statements to the contrary, certainly are not sufficient to support a verdict.

It thus cannot fairly be said that the evidence here is either disputed or conflicting, or even that conflicting inferences may be drawn from the evidence. There is no dispute

*In *Southern Ry. Co.* v. *Walters, supra,* the negligence charged was failing to stop a train and flag a crossing before proceeding over it, and with respect to the testimony of a witness that the train did not come to a stop this court said ''This testimony was shown to have no adequate foundation by her admission that when she first noticed the train the locomotive and several cars had crossed Bond Avenue'' and the court thereupon held that it was *error to refuse to direct a verdict* for the railroad company.

as to what inventory and books were produced. The question is, not what inventory and books were produced, but whether or not those which were produced constitute compliance with the Iron Safe Clause; and certainly it is not allowable for a witness to decide that question by drawing his own inferences from them (*Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, at p. 340).

Whether or not the inventory and books produced constitute a compliance with the clause was a question of law for the court and should not have been submitted to the jury. *Home Ins. Co.* v. *Williams,* 237 Fed. 171, 176, and *Houff* v. *German Ins. Co.,* 110 Va. 585, 591, 592, 594, 66 S. E. 834, specifically so hold as to the Iron Safe Clause. *Gunther* v. *Liverpool Ins. Co.,* 134 U. S. 110, 116, so holds with respect to analogous clauses in insurance policies. See, also, *Southern Pacific Co.* v. *Poole,* 160 U. S. 438, 440; *Upton* v. *Tribilcock,* 91 U. S. 45, 54; *Mosheuvel* v. *District of Columbia,* 191 U. S. 247, 252.

We turn, therefore, to the question whether, as matter of law, there was a compliance with the clause.

As to the *inventory,* the clause, as already stated, requires "a complete itemized inventory of stock on hand" (R. 243). The proper construction of those words plainly and obviously is that the clause requires a complete itemized inventory of the *stock insured,* and the clause has been so construed (*Western Assurance Co.* v. *Kemendo,* 94 Texas 367, 371, 372; 60 S. W. 661; *Dorroh-Kelly Co.* v. *Orient Ins. Co.,* 104 Texas 199, 202, 135 S. W. 1165). An inventory which does not show merchandise held for others as well as merchandise owned, where both are covered by the policy, thus is a partial inventory and not a complete inventory, and hence does not comply with the clause. Such a partial inventory puts the insurance company at a disadvantage in checking other information which is given; and

that is particularly so where, as in this case, the insured's business consists largely of making finished products from materials furnished by others. In some cases, information as to property held for others has a material bearing where other insurance is permitted or where the policy holder is a co-insurer. In some cases it has a material bearing as to the presence of prohibited articles, like gasoline or explosives. It is not necessary, however, for an insurer to show affirmatively that a failure to inventory merchandise held for others actually has caused loss or damage. It is enough that insurers contract for complete inventories; for, using the language of this court in *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452, 462, 464, it is "immaterial to consider the reasons" why they contract for a complete inventory, and immaterial whether "in the opinion of the court and jury" an incomplete one would serve them just as well.

In *Dorroh-Kelly Co.* v. *Orient Ins. Co.,* 104 Texas 199, 135 S. W. 1165, the inventory totalled $17,588.01, and property of a value of $3,000 or $4,000 was left uninventoried, and it was held to be error to refuse to give a peremptory instruction for the defendant because of non-compliance with a clause identically the same as the one involved in the case at bar. The court there said (104 Tex. 202):

> "Can it be said that an invoice is 'complete', and 'itemized', when it does not contain substantially all of the articles embraced in the stock at the time? The very language itself requires this and while it is true that the omission of unimportant items of little value and consequence would not be sufficient to defeat the right of recovery, yet it must be equally true that when the contract has not been complied with in material respects, the plaintiff can not recover. There was omitted, purposely, from the invoice articles of the value of three or four thousand dollars. This is not insignifi-

cant in any sense. It is not shown by the evidence that there was any means by which the articles so omitted could be established as having existed in the stock at the time the policy was issued. There is no ground upon which the claim of a substantial compliance with the contract can be sustained. The Insurance Company could not tell what was the class, or kind, or value of the different items which were omitted from the inventory. *It is true that the evidence would sustain the claim that the inventory showed that the articles enumerated were of greater value than the total amount of insurance called for, but this was not the information contracted for.* No doubt this was a matter of oversight on the part of plaintiffs in error and works a hardship to them, and we are not able to see from the evidence that it would have been any advantage to the Insurance Company to have had all of the items upon the inventory, but it is not for this court to vary the terms of the contract into which the parties entered nor to speculate as to what might or might not have been the consequences if the contract had been differently expressed. Parties make their own contracts and it is not within the province of this court to vary their terms in order to protect them from the consequences of their own oversights and failures in non-observance of obligations assumed."

In *Hanover Fire Ins. Co.* v. *Moore,* 280 S. W. 538 (Tex. 1926), the court, after referring to the preceding case, said (p. 540):

> "This decision has never been questioned in any way. It is in harmony with other jurisdictions and the text-book writers."

As to the absence of a *stock book or cash book,* the authorities are equally emphatic.

In *Home Ins. Co.* v. *Williams,* 237 Fed. 171, 175, 176 (5 C. C. A.), it was held that such a bank statement as was

produced by petitioner was not a compliance with the clause even though it showed, in addition, the names of the persons to whom the checks were payable.

In *Everett-Ridley-Ragan Co.* v. *Traders Ins. Co.*, 121 Ga. 228, 48 S. E. 918, it was said (p. 229):

> "A cash-book which only shows the amount of cash taken in at the end of each day, giving *no indication of the source from which the cash is derived,* whether from cash sales, from the payment of past-due bills, or what not, can in no sense be considered 'a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit'."

The case of *Scottish Union Ins. Co.* v. *Virginia Shirt Co.*, 113 Va. 353, 74 S. E. 228, is particularly applicable because of the similarity of the nature of the business conducted by the plaintiff in that case and the plaintiff in this case. The court there said (pp. 361, 362):

> "The plaintiff was conducting a large shirt and overall manufacturing business, and without such a compliance with the requirements of the policy as furnished a complete record of the business transacted, *distinguishing between the kinds of goods used, the kinds of garments manufactured, the quality of goods used in making them, the sales and shipments of the manufactured garments, as well as the purchases of material actually made, the goods converted into the garments sold and shipped,* there is no room for a difference of opinion among reasonably fair-minded men that there has not been a substantial compliance on the part of the plaintiff with the obligations imposed upon it by its policy."

Similarly, in *Wright* v. *Union Ins. Co.*, 13 Fed. 2d 612 (5 C. C. A.), it was held that a verdict was properly directed where the day book in which sales on credit were recorded in detail was lost and the ledger, to which the day

book was posted, merely described the goods sold as groceries, dry goods, or hardware. The court stated that the clause in question is satisfied if the books are kept in such manner as to enable a person of ordinary intelligence, accustomed to accounts, to refer to the books and *ascertain therefrom the amount of goods on hand at the time of the fire* (p. 613). But it then added (pp. 613, 614):

> "The entries of credit sales in the ledger are clearly insufficient for that purpose, as the amount of goods sold under the general description is not shown. Nor is it possible to ascertain that amount, so as to arrive at what was left on hand, by including in such entries the prices charged upon the credit sales that were made. A charge made and entered indicates nothing without a description of the goods. Only by such description is it possible for an accountant to discover whether the goods were sold at, above, or below cost or value. If plaintiff sold at a loss, the stock of goods destroyed by fire was smaller than it would have been if he had sold at cost, or at a profit. On the other hand, if he sold at a profit, his stock was larger than it would have been if he had sold at cost, or at a loss. It follows that the books produced in evidence failed to disclose the extent of plaintiff's loss.
>
> "It was not permissible for plaintiff to show by his oral testimony that he sold at a profit, because the parties stipulated that the books should present a complete record of business transactions, including all sales."

POINT II.

Petitioner's own evidence likewise establishes that its claim was fraudulent, and for that additional reason a verdict should have been directed for respondent.

In the opinion delivered upon the first hearing—written by the judge who dissented from the court's final decision—it is stated that according to respondent's evidence petitioner's books "showed clear indications of having been fabricated" (R. 317). But because petitioner's witnesses testified that they were honestly kept and that the proofs of loss conformed thereto and were honest, it was concluded that it cannot be said that the evidence "so clearly established fraud on the part of the plaintiff that the defendant was entitled to a directed verdict on that ground" (R. 317).

No discussion of the evidence appears in the opinion, and the fact that the evidence of fabrication of books and of fraudulent exaggeration of the claim appears *in petitioner's own evidence* was overlooked or ignored. There, again, therefore, we submit that the court failed to follow the rule with respect to directing verdicts which this court repeatedly has laid down. (See cases cited at pp. 24, 25, *supra.*)

It may be noted in passing that we find in the record no testimony by any witness that the claim was "honest", as is stated in the opinion at R. 317. But even if there were, the only theory upon which such testimony could be regarded as sufficient in itself to justify a refusal to direct a verdict is the "scintilla rule" which this court definitely and repeatedly has rejected. The duties of judges would be light indeed, and they rightly would be termed "mere moderators" (*Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S.

658, 660), if cases were to be submitted to juries merely because some witness asserted his honesty.

We do not ask that the court resolve a conflict of evidence. We *do* ask that the *probative force of petitioner's own evidence* be analyzed.

That evidence has been set forth at pages 12 to 21, *supra,* and without rehearsing or commenting upon it here we submit that it clearly and patently is insufficient to sustain a verdict for petitioner. Even if all else be laid aside, the claiming of $14,835.10 for machinery and accessories (R. 253, 254) in the face of an actual inventory showing those items plus others at only $9,869.92 (R. 279, 280), was plainly fraudulent; and under the rule stated in the cases cited at pages 24, 25, *supra,* it was error to refuse to direct a verdict for respondent.

The Circuit Court of Appeals itself finally arrived at that conclusion with respect to petitioner's claim as to "cost of labor", and correctly found that, as the evidence established fraud in respect of that item, petitioner had forfeited all claim under the policy and a verdict should have been directed for respondent (R. 336, 337).

The judge who wrote for the court upon the first hearing dissented from that view (R. 338-340), and in his dissenting opinion made several statements the error in which we now desire to point out.

He referred to the testimony of Gorbea, the accountant who examined petitioner's books after the fire but who had no previous connection with petitioner, and said that that testimony substantiated the item in question (R. 338). But Gorbea merely testified to the item on the books of *goods in process* (R. 338, 35, 36, 37), and the learned judge seems to have been utterly oblivious of the manifest difference between *goods in process* and *cost of labor on*

goods in process. With that confusion in his mind, it is not surprising that he failed to grasp the significance of the testimony referred to in the prevailing opinion at R. 338. The point of the matter is that, whereas the books showed "goods in process $2,524" as testified by Gorbea at R. 35, 36, 37, the proof of claim claimed $2,524.50 for "labor on goods in process" *in addition to* other amounts for raw materials and manufactured and unmanufactured goods (R. 253), and Rivera Soler's testimony established that the $2,524 shown on the books was *neither* cost of labor *nor* goods in process but, on the contrary, was the contract price petitioner was to receive for goods manufactured and sold and included overhead expenses and profit (R. 110, 116, 117, quoted at p. 13, *supra*).

The dissenting judge made the further statement that "There is no evidence that Soler was making any profit on this work, or did not take it at cost" (R. 340), which is quite remarkable and plainly erroneous because Soler's own testimony is that in the item of cost of labor he included "overhead expenses *and my profit*" (R. 117)—testimony to which the dissenting judge did not refer although he quoted other parts of Soler's testimony at length (R. 339). How could Soler have acted honestly, as suggested by the dissenting judge, when he swore in the proof of loss that no profit was included (R. 252) and yet knew that the $2,524.50 claimed therein was contract price including profit?

The dissenting judge finally wound up with the statement "Apparently, this item was fully supported by the vouchers which were not put in" (R. 340). Since when, however, can a claim be supported by documents which not only are not put in evidence but actually were excluded from evidence because not connected (R. 38)?

The court's final decision that the evidence established fraud and entitled respondent to the direction of a verdict clearly was correct and should be affirmed.

POINT III.

The jury's verdict constitutes a finding that petitioner asserted a fraudulent claim, and under that finding it is respondent, not petitioner, which is entitled to judgment.

Under Condition 12 of the policy all benefit under it is forfeited if the insured's claim thereunder "be in any respect fraudulent" or if "any false declaration be made or used in support thereof," or if "any fraudulent means or devices" be used to obtain a benefit under the policy (R. 248; *supra*, p. 8).

The settled rule with respect to such provisions is that any false statement knowingly and willfully made with respect to any matter material to the insurance avoids the policy (*Atlas Assurance Co.* v. *Hurst*, 11 Fed. 2d 250, 251; *Columbian Ins. Co.* v. *Modern Laundry*, 277 Fed. 355, 360); and that includes an oath as to values in a proof of loss, because such an oath is "a sworn estimate of value by one having special knowledge of the property made with intent that the other party, ignorant on the subject, and with unequal means of information, should rely upon it to his injury" (*Orenstein* v. *Star Ins. Co.*, 10 Fed. 2d 754, 757).

Confining ourselves, for the moment, to what appears from the pleadings, verdict, and judgment, as did the Circuit Court of Appeals, the situation, in brief resumé, is this:* Petitioner's proof of claim listed various items of property which it asserted were owned and destroyed and fixed the

*The policy is a part of the complaint as Exhibit A thereof (R. 3) and the proof of claim is a part thereof as Exhibit B (R. 3).

value thereof at $35,926.06 (R. 253-255). That amount is stated to be the cash value of the property at the time of the fire without including any profit (R. 252). The property enumerated is all property of an ordinary sort—sewing machines, shelves, cloth, thread, and the like—with nothing unique or extraordinary about it (R. 253-255). It also is property used in the business of a corporation, and it was the duty of the officers of that corporation to know the nature and value of its property, and there thus is a presumption that they knew it. The statement is signed by Rivera Soler (R. 255). The statement as to the *nature and value* of the property is repeated in the complaint (R. 3), which was sworn to by Rivera Soler (R. 4). In that complaint, judgment for the full face of the policy, $30,000, is demanded (R. 4). Respondent in its answer denied both the existence, ownership, and destruction of the property as to which indemnity was so sought and the alleged values thereof (R. 5, 6). Despite that challenge, the claim was persisted in. A mistake of $1,092 was conceded upon the trial (R. 36), but with that exception the claim was pressed as originally made and was attempted to be supported by sworn testimony. The jury's verdict assessed petitioner's damages at $17,000 (R. 12, 23, 24).

That, of course, was the jury's finding as to the value of the property destroyed. The value so found by the jury is thus less than half the amount which petitioner had sworn to, and not much more than half of what it had tried to collect. Stated in terms of dollars, the verdict is $13,000 less than it would have been if property worth the amount sworn to, or even within $5,926.06 of the amount sworn to, had been in fact destroyed. That is, if the jury believed that property worth either the $35,926.06 sworn to or any other amount down to $30,000, had been destroyed, then the verdict would have been for $30,000, whereas it was for

only $17,000. Stated in still another form, the jury found that property of an extremely ordinary and staple sort, having no unique characteristics or unusual elements of value, was worth $18,000 less than had been stated in the proof of claim.

Under these circumstances, it cannot be doubted, we submit, that the verdict necessarily imports a finding that the claim was in some respect fraudulent, that some false declaration had been made or used in support of it, and that some fraudulent means or device had been used to obtain a benefit under the policy; and numerous courts have held that such a verdict must be so regarded.

In *Sternfeld* v. *Park Fire Ins. Co.*, 50 Hun 262 (N. Y. Sup. Ct., General Term, First Dept.), in which the defense was fraudulent overvaluation, the court said (pp. 264-266):

> "The jury, by their verdict, found in favor of the plaintiffs for the sum of $750, being half the amount of the defendant's policy. To render this verdict the jury must have reached the conclusion, as the whole insurance did not exceed the sum of $10,000, and it was to be divided and equally proportioned between the companies whose policies were issued upon the property; that the whole loss of De Vulder by the fire amounted to no more than the sum of $5,000. This left an over-statement in his proofs of loss of $18,342.47. *To that extent the jury must necessarily have assumed that the proofs of loss were untruthful.* Neither the evidence of De Vulder, nor that of any other witness, tended to explain this difference on the ground of any mistake or misapprehension concerning either of the facts upon which the proofs were made and verified; and, as there was no ground from which it could be inferred that the loss had been overstated in this manner by mistake, there was reason for assuming that it had been fraudulently made to defraud the insurance company out of the other half of

the amount of the policy. *Such an inference necessarily follows from so great a difference.* The loss in this manner had been stated by the assured to an amount exceeding three-fifths of what had actually been sustained; and it is not to be supposed or presumed that it could have been so over-stated by any mistake intervening in the statements presented by the proofs. But the inference is direct and plainly to be drawn from this difference, that De Vulder must have known that this statement was untruthful, and his affidavit verifying it was false, and from that the conclusion follows, that it was intended thereby to defraud the insurance company; and this inference is materially strengthened by the fact that the preceding inventory of De Vulder's stock, taken in January, 1884, amounted to no more than the sum of $20,478.13, and his business afterwards was not prosperous, and the fire, causing the loss, was of very short duration and confined only to a portion of the store.

"In *Boynton* v. *Andrews* (63 N. Y. 93), property had been taken by a manufacturing corporation for which it had issued its stock. The property was proven to have been worth no more than fifty per cent. of the amount for which it was received by the company and its stock was issued. *And from this difference the court held that the law would assume the transaction to be fraudulent, leaving no question of fact as to the intent to be passed upon by a jury.* Applying the principle of that decision to this case and the inference is much more strongly sustained that there was an intent to deceive and defraud the company by this over-statement of the loss of the assured. *And that the over-statement existed is clear from the verdict of the jury, which proceeded upon the conclusion that the actual loss did not exceed the sum of $5,000. This could have been adopted on no other view of the evidence than that the assured had over-stated his loss to the exent of upwards of $18,000.* And upon that fact necessarily

> entering into the case, from the verdict which the jury have rendered, *they should, instead of finding for the plaintiff any sum of money, have found in favor of the defendant*, for the policy had provided that, 'any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination or in the proof of loss or otherwise, shall cause a forfeiture of all claim on this company under this policy, and in such case this company shall have the right at any time to require the same to be delivered up to be canceled.' *Under this provision this fraudulent overstatement of the loss forfeited all claim to indemnity upon the policy and entitled the company to a verdict against the plaintiff.*"

In *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 N. Y. App. Div. 187, in which again the defense was fraudulent overvaluation, the plaintiff claimed $22,761.10 in his proof of loss and his testimony at the trial, and the jury found in his favor for $5,000, and in an opinion by Presiding Justice HUBBS, now Judge HUBBS of the New York Court of Appeals, which was concurred in by Mr. Justice CROUCH, who, also, is now a Judge of the New York Court of Appeals, the Court said (pp. 189, 190):

> "*Juries are prone to disregard a defense based on the clause in question and no doubt justify such action on the ground that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. There is no justification in law for such conduct.* When the insurance company establishes that the statements made were relevant, material and intentionally false it has established its defense. It is not required to assume the burden of convincing a jury that it has been injured by such statements. If it appears that a plaintiff has willfully and fraudulently placed in the proofs of loss a statement of

> property lost which he did not possess, or has placed a false and fraudulent value upon the articles which he did own, he is not entitled to recover anything."

In like manner, in *Riley* v. *Aetna Ins. Co.*, 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983 and *Hiller Co.* v. *Insurance Co. of N. A.*, 125 La. 938, 52 So. 104, the jury found for the insured for about half the amount claimed, and in each case it was held that the judgment entered upon the verdict should be reversed because of fraudulent overvaluation.

In *Levy* v. *Baillie*, 7 Bing. 349 (1831), the plaintiff made affidavit that his loss was £1085 and the jury found in his favor for £500; and defendant's rule for a new trial on the ground that such verdict "*amounted in effect to a verdict for the defendants* under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim" was *made absolute.*

In *McLeod* v. *Citizens' Ins. Co.*, 13 Nova Scotia 21, it was said (pp. 27, 28):

> "The second jury found a verdict for $2000, of which we must assume one-half to go for the machinery, leaving $1000 for the mill, that is, one-third of what the plaintiffs swore it was worth, and one-half of what they insured on it. This of itself is an index of fraud under the decision in Levy *v.* Baillie, 7 Bing. 349."

and judgment was there ordered for the defendant despite the jury's verdict for the plaintiff.

Each of the six cases last cited proceeds upon identically the same principle which was applied by the Circuit Court of Appeals in the case at bar, *viz.*, that the verdict itself imports a finding that the plaintiff's claim was fraudulent; and we submit that that court was clearly right in its final conclusion (R. 336):

"It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000 shows on its face and as matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000."

The same principle was applied in *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, in which the jury in a personal injury case found in *favor* of the employee-driver and *against* the employer-owner. The New York Court of Appeals there said (pp. 233-234):

"*We think the verdict as a whole was equivalent to one finding no cause of action against the appellant.* * * * The appellant's liability was purely of a derivative or secondary character on the theory of *respondeat superior,* and when the jury found that the employee was free from tortious conduct or that the plaintiff was guilty of contributory negligence, *the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned,* and the verdict should have been in its favor. *There was then left no support for or consistency in a verdict against the employer.*

When the jury took its improper and unwarranted course, nevertheless, of rendering a verdict against it, a situation was presented somewhat analogous to the one which arises where inconsistent findings have been made or *where a jury has found a general verdict which is inconsistent with special findings,* and in determining whether the judgment is supported and authorized we think that the appellant is entitled to have applied the principles which give to an appellant the benefit of the most advantageous of the inconsistent findings (*Whalen* v. *Stuart,* 194 N. Y. 495), or which make the

special findings superior in effect to the general verdict (Code, § 1188), *and thus to have the award of damages against it controlled by and yield to the verdict and findings that the facts did not exist which justified such an award of damages.*"

The facts which entitle the insurance company to judgment, viz., the assertion of a fraudulent claim, having been established by the verdict, the situation obviously was not one in which respondent should be forced to move for or to submit to a new trial (see authorities cited in Petition for Rehearing at R. 326, 327). On the contrary, it became the duty of the court to award the relief which the law requires upon those facts, *i. e.*, to direct that judgment upon the verdict be arrested (*Slacum* v. *Pomery*, 6 Cranch 221, 225; *Cragin* v. *Lovell*, 109 U. S. 194, 199, 200.)

Petitioner has cited a number of cases which it claims to be to the contrary, but an examination of them will instantly reveal that none of them presented the situation presented in the case at bar and that no conflict exists.

Insurance Companies v. *Weides*, 14 Wall. 375, which is particularly relied upon, holds nothing more than that whether or not there has been such fraud or false swearing as voids a policy is a question of fact which *ordinarily* must be submitted to the jury.* In the case at bar that question *was* submitted to the jury, and what the Circuit Court of Appeals has held is, not that it was error to submit it, but that where the jury finds for an amount grossly disproportionate to the amount sworn to, its verdict necessarily im-

*Other cases in this court recognize that it sometimes is proper to direct a verdict for the insurer even upon that question: *Hermanos* v. *Royal Exchange Assurance Co.*, 277 U. S. 590, denying petition for certiorari to review 23 Fed. 2d 270; *Gunther* v. *Liverpool Ins. Co.*, 134 U. S. 110, 116; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254.

ports a finding of fraudulent overvaluation and consequently in legal effect is a verdict for the defendant and does not justify the entry of judgment thereon in favor of the plaintiff.

In *Mack* v. *Lancashire Ins. Co.*, 4 Fed. 59, upon which petitioner also lays considerable stress, the question was submitted to the jury, but the report does not show what the jury found or what judgment was entered upon its verdict.

Spring Gardens Ins. Co. v. *Amusement Syndicate Co.*, 178 Fed. 519, was tried before a *master*, who specifically found that the proof of loss was made in good faith and not with any view to deceive (p. 531).

In *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 Fed. 2d 816, the jury's verdict was for *the total amount of the policy sued on* and thus indicated, as pointed out by the court, "a loss of true values equal to or more than the amount of the verdict" (p. 818).

In *Camden Fire Ins. Ass'n.* v. *Penick*, 2 Fed. 2d 964, the verdict and judgment were based on the loss of 788 bales of cotton, which was *the identical amount claimed in the amended complaint.*

Atlas Ins. Co. v. *Hurst*, 11 Fed. 2d 250, must be read in connection with *Connecticut Fire Ins. Co.* v. *Hurst*, 11 Fed. 2d 254, because they were companion cases arising out of the same fire, and the total of all the judgments was $24,182.52 on policies aggregating $27,000.

In *National Fire Ins. Co.* v. *Renier*, 22 Fed. 2d 671, the report does not disclose either the amount claimed or the amount awarded.

In *Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 68 Fed. 2d 237, a judgment in favor of the insured was reversed because of errors in the charge, and all that actually was held

was that in the face of conflicting evidence as to the value it was proper to submit the case to the jury.

American Central Ins. Co. v. *Harmon Knitting Mills*, 39 Fed. 2d 21, was an *equity case* in which there was a specific finding of absence of intent to defraud.

The dissenting judge argued that fraud means conscious dishonesty and is a matter of fact (R. 337). That of course is true, but immaterial; for conscious dishonesty as matter of fact may be inferred from circumstances as well as established by direct evidence.

The dissenting judge further argued that even an overvaluation of as much as one-half might be the result of honest mistake or honest difference of opinion (R. 338). But assuming *arguendo* that that conceivably may be so with respect to certain types of property—art objects, gold mines, oil wells, and the like—it certainly is indulging in fantasy at the expense of reality to say that it is true with respect to sewing machines, thread, and such other articles as are here involved. And even if it be assumed that the ordinary householder may honestly overvalue his household furniture, there certainly can be no presumption that officers of a corporation are ignorant of the nature and value of the property which they are actually using in the conduct of the business of the corporation. It is their duty to know and there is a presumption that they do know. Furthermore, the dissenting judge overlooked the fact that the question is not simply one of fixing the value of articles concededly destroyed. Another, and perhaps still more important element, is whether all the articles for which indemnity was claimed actually were owned and were destroyed. The jury's verdict imports, not merely gross

overvaluation of property concededly owned and destroyed, but, also, a fraudulent claim as to what property was owned and destroyed.

The dissenting judge next suggested that it should be assumed that the jury were properly instructed that fraudulent statements in a proof of loss would entitle the respondent to a verdict, and that upon that theory the verdict involved a finding that the proofs of loss were not fraudulent (R. 338). There are two vices in that suggestion. One is that it assumes that juries always follow instructions, whereas we know that, particularly in cases of this kind, they are "prone to disregard" the defense of fraudulent claim upon the theory that they are doing substantial justice if they give the insured what he actually lost instead of what he fraudulently tried to get (see quotation from Judge HUBBS, at pp. 38-39, *supra*). Another vice in the suggestion of the dissenting judge is that it wholly and completely ignores the inescapable fact that the jury did fix the damages at $17,000, which is utterly inexplicable upon the theory he suggests that they found no overvaluation.

The dissenting judge next says that if the verdict be regarded as inconsistent, the point should have been brought to the attention of the trial judge on a motion to set the verdict aside (R. 338). That, however, is but a reversion to the untenable position he took upon the first hearing that the point could not be considered in the absence of such motion and an exception (R. 317, 318). There certainly was no reason why respondent should move to set aside a verdict which it claimed established the fact which entitled it to judgment (*Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, cited in petition for rehearing at R. 326). Furthermore, the question whether the verdict authorized a judgment in petitioner's favor necessarily was presented to and ruled upon by the trial judge when he "ordered that

judgment in accordance with the verdict of the jury be entered" (R. 24), for in directing judgment upon a verdict such question always is presented (see *World's Columbian Exposition Co.* v. *Republic of France,* 91 Fed. 64, cited in petition for rehearing at R. 323 and 325).

The dissenting judge next posed the question "How can we say that the error in the verdict—if there was one—did not consist in awarding inadequate damages on an honest claim, rather than awarding any damages on a dishonest one?" (R. 338). The practical and conclusive answer to that is that petitioner has not at any time or in any form asserted that the verdict is inadequate.

The dissenting judge also asserts broadly that the question whether or not the jury's verdict constitutes a finding of fraudulent overvaluation necessarily involves an examination of the evidence (R. 338). That suggestion merits serious consideration, for if well founded a serious defect in our legal machinery, a serious impediment to the administration of justice, has been discovered.

Let us recapitulate the situation: A trial of issues of fact, duly framed upon proper pleadings, proceeds without error, we assume, down to the rendition of a verdict. That verdict, let us assume, is of the kind described in *Pangburn* v. *Buick Motor Co.,* 211 N. Y. 228, 231, as "the result of confusion or misplaced sympathy and logic" and "inconsistent and absurd and contrary to the instructions." Nevertheless, the trial judge enters judgment upon it. What is the remedy of the party against whom that judgment is entered? The granting of a new trial is discretionary with the trial court and a denial thereof cannot be reviewed on appeal. The only remedy is an appeal from the judgment. There is no such thing as an exception to a verdict. There is no such thing as an exception to a judgment. There is nothing to incorporate into a bill of ex-

ceptions. Can it be possible that, as the dissenting judge suggests, the appellate court is powerless to afford relief? If so, we repeat, a serious defect of procedure has been discovered. For if the evidence cannot be considered, and if the question whether or not the verdict supports the judgment cannot be considered without considering the evidence, then the appellate court is powerless and the right of review is effectually emasculated.

The problem above stated is the precise problem which confronted the court in *Pangburn* v. *Buick Motor Co., supra,* and it solved the problem by holding that, despite the general rule that all questions must be presented by exception, the question whether a verdict supports a judgment may be reviewed on appeal from the judgment without any exception because there has been no opportunity to take one (211 N. Y., p. 235).

Upon an appeal taken under such a situation as we have above described, we are very far from saying that the appellate court could not consider the evidence if actually incorporated in the record by a bill of exceptions taken upon some other point than whether the verdict supported the judgment. In fact, we think the Circuit Court of Appeals went too far in limiting itself to the strict record. We think it very well might have considered the evidence. Of course it could not do so for the purpose of reexamining any issue of fact, but we see no reason why it might not look at the evidence for the purpose of illuminating and interpreting the verdict and for the purpose of ascertaining whether there was any possible explanation other than that of actual fraud—just as appellate courts sometimes look to the opinion of a trial court for the purpose of explaining or interpreting its judgment.

If such examination of the evidence be made in this case, the possibility of honest mistake is of course at once

excluded and the palpable and intentional fraud stands out in all its brazen effrontery.

POINT IV.

The Circuit Court of Appeals was right in directing that judgment upon the verdict be arrested.

It was not necessary for it to award a new trial.

In a brief submitted by petitioner since certiorari was granted the contention is made that under *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, the Circuit Court of Appeals should have awarded a new trial instead of directing an arrest of judgment.

A sufficient answer to that contention would seem to be that in the subsequent case of *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, an objection to the action of the Circuit Court of Appeals in reversing a judgment without remanding for new trial was disposed of as follows (pp. 515, 516):

> "There was no objection made to that action and no request for a remand of the case. And besides there was nothing to retry. The case involves only propositions of law."

Those remarks of this court are equally applicable here.

We note, also, that in *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 195, the court, in holding that it was error to refuse to direct a verdict, merely reversed and remanded "for further proceedings in conformity with this opinion" (p. 195), and did not say that a new trial should be had.

It perhaps nevertheless is appropriate to consider the matter further.

In the same month in which what became the Seventh Amendment was submitted to the States, the same Congress which framed and submitted it also passed the Judiciary Act of 1789, in which it was enacted that

> "when a judgment or decree shall be reversed in a circuit court, such court shall proceed to *render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein,* except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision." (1 Stat. 85, sec. 24.)

If, therefore, the rendition of final judgment upon reversal be an infraction of the Seventh Amendment, then an infracting statute was enacted by those who framed and submitted the amendment and almost literally at the same moment that they framed and submitted it. We suggest that that seems improbable.

The framers of the statute and of the amendment were acquainted with the common law. They were brought up within it and were more imbued with its spirit than we of this age can become by reading the ancient reports (Compare *Diaz* v. *Gonzalez,* 261 U. S. 102, 106). They also were particularly concerned about the right of trial by jury and particularly solicitous about preserving it. They had no thought of limiting it. They were preserving it, not only in the proposed amendment to the Constitution, but, also, in the statute itself.

In Sections 9, 12 and 13, they had made three specific provisions for trial by jury (1 Stat. 77, 80, 81). In Section 17 they had provided that in cases where there had been a trial by jury all the courts of the United States

should have power to grant new trials "for reasons for which new trials have usually been granted in the courts of law" (1 Stat. 83). In Section 22 they had limited the review of judgments and decrees to a review *upon writ of error* and had expressly provided that there should be no reversal "for any error in fact" (1 Stat. 84, 85). That was a drastic limitation upon appellate jurisdiction as then generally exercised, and the limitation was made in pursuance of a purpose to preserve the existing right of trial by jury.*

*Charles Warren, in an article "*New Light on the History of the Federal Judiciary Act of 1789*" published in November, 1923, says (37 Harvard Law Review 49, 75, 102):

> "The anxiety to preserve the right of jury trial was shown by the insertion by the Senate, at the end of Section 9 of the Act: 'and the trial of issues in (*sic*) fact in the District Court, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury.'" (p. 75.)
>
> "That the drafters of the Act had taken warning by the violent and reiterated attacks made upon that portion of the Constitution which vested the Supreme Court with appellate jurisdiction 'both as to law and fact,' and were exceedingly anxious to allay the fears of those who saw in this provision a determination to abolish jury trial and to adopt a system of civil law appeals, is seen from the provision which they made in Sections 21 and 23 of the Draft Bill (Sections 22 and 25 of the Act), with reference to appellate jurisdiction; for they restricted it in a more drastically extreme manner than even the opponents of the Constitution had advocated. Most of such opponents had admitted that an appeal as to facts as well as law was warranted in admiralty and in equity cases, and that such an appeal in those classes of causes would not be in violation of the common law jury system. Appeals as to fact in admiralty cases already existed in the Federal Court, under Acts of the Continental Congress and of the Congress of the Confederation, and were recognized as proper in many of the State Courts. Appeals as to fact in equity cases also were already recognized in those States which had Courts of Chancery. But the drafters of the Act now determined that there should not be an appeal on questions of fact in *any* class of cases; and they provided for appellate jurisdiction from the Circuit to the Supreme Court only on 'petition in error' ('petition in error' being an anomalous term, which was changed to 'writ of error' by amendment in the Senate), presenting only questions of law for the determination of the appellate Court. This provision later caused great trouble and inconvenience in equity and admiralty appeals; but it was not altered for fourteen years, when, in 1803, an Act was passed by Congress, providing for appeals in equity and admiralty cases, instead of writs of error; and thus the courts were given power to pass upon the facts as well as the law in such cases, and their power in this direction was still further enhanced by a provision that in such cases they might even hear new evidence." (pp. 102, 103).

In the same article it also is pointed out that the Judiciary Act and the proposed amendments to the Constitution were kept before Congress and considered practically simultaneously because of the bearing of each upon the other (37 *Harvard Law Review* 111 *et seq.*).

Considering the history of the times, therefore, we suggest the great improbability that it ever occurred to any of those concerned in the adoption of the Seventh Amendment that the rendition of final judgment by an appellate court upon reversing a judgment of a lower court was any infraction of the right of trial by jury.

The fact that a provision that there should be no re-examination of the facts in any appellate court (Sec. 22, at p. 49, *supra*) was accompanied by a provision that upon reversal the appellate court should render such judgment as the court below should have rendered (Sec. 24, at p. 48, *supra*), seems to us to point to the conclusion that, in the minds of the framers of the statute and of the Seventh Amendment, with all their knowledge of the common law and their desire to preserve trial by jury inviolate, *the rendition of final judgment by the appellate court upon reversal does not constitute a re-examination of the facts.*

The practice followed in some early cases seems to us to be a further indication to that effect. In *Wilson* v. *Lenox*, 1 Cranch. 193, judgment for the plaintiff was entered upon a verdict, and upon writ of error from this court judgment was "reversed and arrested" (p. 211). In *Fenwick* v. *Sears*, 1 Cranch. 259, there was a general verdict for the plaintiff and a judgment accordingly, and this court reversed the judgment and directed that judgment be rendered for the defendant (p. 281). In *Thomson* v. *Jameson*, 1 Cranch. 282, judgment for the plaintiff was entered upon a verdict despite defendant's motion in arrest of judgment, and this court simply reversed the judgment. In *Mandeville* v. *Riddle*, 1 Cranch. 290, judgment for the plaintiff was entered upon a verdict, and this court, being of the opinion that the action was not maintainable, simply reversed the judgment. In *Marine Ins. Co.* v. *Young*, 1 Cranch. 332, there was a verdict for the plaintiff on one count and for the defendant on

another, and judgment for the plaintiff was entered despite a motion in arrest of judgment, and this court "reversed the judgment and ordered it to be arrested" (p. 342). In *Dunlop* v. *Ball,* 2 Cranch. 180, this court held that the lower court had erred in instructing the jury with respect to a plea of payment and remanded the case for trial "with directions that there is no presumption of payment." In *United States* v. *Cantrill,* 4 Cranch. 167, there was a verdict of guilty, and upon a certificate of division of opinion whether judgment on the verdict should be arrested this court directed that judgment be arrested. In *Lewis* v. *Harwood,* 6 Cranch. 82, there was a verdict and judgment for the plaintiff, and this court, holding that the bond sued upon was not assignable, reversed the judgment and directed that judgment on the verdict be arrested. In *Hughes* v. *Mohr,* 7 Cranch. 176, there was a verdict and judgment for the plaintiff, and this court, holding that certain pleas were good and that demurrers thereto should have been overruled instead of sustained, reversed the judgment and rendered judgment for the defendant. In *Page* v. *Bank of Alexandria,* 7 Wheat. 35, there was judgment for the plaintiff on a demurrer to the evidence, and this court, holding that "*there not being sufficient evidence to support the second count,*" reversed the judgment and directed the entry of judgment for the defendants. In each of the following cases this court reversed judgments entered upon *special verdicts* and directed the entry of judgment for the opposite party: *Hooe* v. *Groverman,* 1 Cranch. 214; *Fitzsimmons* v. *Newport Ins. Co.,* 4 Cranch. 185; *Otis* v. *Walter,* 11 Wheat. 192; *Comegys* v. *Vasse,* 1 Pet. 193; *Bank of Alexandria* v. *Swann,* 9 Pet. 33; *McCool* v. *Smith,* 1 Black 459. In *La Roche* v. *Jones,* 9 How. 155, there was a verdict subject to the opinion of the court and the trial court ordered judgment for

the plaintiff, and this court reversed and ordered judgment for the defendant.

In none of those cases was there any discussion of the practice, the practice apparently being assumed as well known and unquestionably correct. But in 1870, in *Insurance Companies* v. *Boykin,* 12 Wall. 433, discussion was evoked and this court specifically stated that the rule prescribed by Section 24 of the Act of 1789 was "*the rule by which courts of error were governed at the common law.*"

In that case of *Insurance Companies* v. *Boykin* the early debate in England as to what court should render judgment upon reversal, and the final establishment of the rule that "the House of Lords should give the judgment which the Kings Bench ought to have given", was adverted to at some length and with the citation of several authorities; and with reference to Section 24 this court then said (p. 439):

> "The provisions of our statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subject."

The facts in *Insurance Companies* v. *Boykin* were that four companies, each liable for one-fourth of the total policy, had been sued in one action by their consent, and the jury found that "said defendants did promise and assume as the said plaintiff hath alleged" and assessed the damages at the face amount of the policy. Upon that verdict the Circuit Court entered a judgment for that amount against all defendants jointly. This court, upon writ of error, reversed the judgment of the Circuit Court *but directed the*

proper judgment and did not award a new trial. The court said (pp. 437, 438):

> "The judgment of the court, therefore, which is against the defendants jointly and not severally for the full amount of the policy, with interest, is erroneous and must be reversed.
>
> "But this error does not extend to the verdict. * * * The Circuit Court ought to have rendered a judgment that plaintiff recover of each of said defendants, severally, a sum which would have been the one-fourth part of the $10,000, and interest from the time mentioned in the verdict, and a joint judgment against all the defendants for costs. While we are bound, therefore, to reverse the judgment of that court the foregoing statement indicates very clearly the judgment which this court must render under the twenty-fourth section of the Judiciary Act. * * * , *it is our duty to render the judgment which we have shown that the Circuit Court should have rendered.* The process, the pleadings, the trial, and the verdict are without error, and it surely cannot be necessary to set aside this verdict and award a new trial because the judgment which was rendered on that verdict was erroneous. *And this was also the rule by which courts of error were governed at the common law.*"

In 1872 Congress passed "An Act to further the administration of justice" which embodied numerous provisions as to procedure, one of which was that "The appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, OR *may direct such judgment, decree, or order to be rendered,* OR such further proceedings to be had by the inferior court as the justice of the case may require" (Act of June 1, 1872, 17 Stat. 197). And that statute was considered by this court in *Insurance Company* v. *Piaggio,* 16 Wall. 378 (1872). In that case the jury found for the plaintiff for the full face amount

of the policy "and the further sum of $5000. damages", and judgment to that effect was entered by the Circuit Court. This court, upon writ of error, held that the damages were not recoverable and accordingly reversed the judgment, but *specifically declined to award a new trial* and, on the contrary, remanded the case with directions to enter a judgment for the proper amount. The court there said (pp. 387, 388):

> "Errors of the kind, it is insisted by the defendants, necessarily require that a new *venire* shall be ordered, but the act of Congress to further the administration of justice (17 Stat. at Large, 197) provides that the appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require; and in view of that provision the court is not inclined to adopt the course suggested by the defendants, as it would lead to unnecessary delay and expense.
>
> "Verdicts, it is said, are either general or special, and that if there is error in a case where the verdict is general it can only be corrected by a new trial, and it must be admitted that the rule as suggested finds much countenance in the text-books; nor will it be necessary to depart from that rule in the present case. Strictly speaking, a special verdict is where the jury find the facts of the case and refer the decision of the cause to the court, with a conditional conclusion, that if the court is of the opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then the jury find for the plaintiff; but if otherwise, then they find for the defendant.
>
> "Examples of special verdicts less formal, however, may be found, and the usual course is to sustain such verdicts if they contain all the facts necessary to a

proper judgment between the parties in respect to the matter in controversy. Courts also, in the trial of issues of fact, often propound questions to a jury, and the rule is well settled that such a special finding, even when it is inconsistent with the general verdict, shall control in determining what judgment shall be rendered in the case.

"Undoubtedly a special verdict is erroneous if it does not find all the facts essential to the rendering of the judgment; but if it contain all the facts required for that purpose the better opinion is that the court of original jurisdiction may render such judgment as the facts found require, and if they err, and the error is apparent in the record, that such error may be re-examined on writ of error in this court.

* * * * * * * *

"All the facts are found in this case, and they are all apparent in the record, and inasmuch as the question to be determined is what judgment ought to be rendered on those facts, the court is of the opinion that it is not necessary to order a new *venire*."

In *Ballew* v. *United States*, 160 U. S. 187, an indictment charged two separate crimes in two different counts, and the jury returned a general verdict of guilty, which, this court said, imported a conviction upon both counts. Upon writ of error to the judgment entered upon that verdict, this court held that the conviction was erroneous as to the first count but good as to the second. That presented the question, as stated by the court, "whether error as to one only of the counts must lead to reversal of the conviction on that count alone or to like reversal as to the count where no error exists; in other words, whether, after reversing the judgment, which was on both counts, we can annul the verdict upon the first count alone, and leave the verdict

to stand as to the second count unaffected by the reversal" (pp. 197, 198). In discussing that question the court adverted to the fact that at common law a reviewing court upon writ of error in a criminal case had no power upon reversal either to enter a proper judgment or to remand the cause for that purpose, and that it was not until the statute of 11 & 12 Vict. c. 78, sec. 5, that such power was given in England (p. 198). The court then referred to Section 24 of the Judiciary Act of 1789, which was cited in *Insurance Companies* v. *Boykin, supra,* and to Section 2 of the Act of June 1, 1872, which was cited in *Insurance Company* v. *Piaggio, supra,* and to several other statutes, and then said (pp. 201, 202):

> "It thus conclusively appears that the authority of this court to reverse, *and remand with directions to render such proper judgment as the case might require,* upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court.
>
> "From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that *general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.*"

The court thereupon concluded that, as the only error in the record related to the crime covered by the first count, the judgment should be reversed and the cause remanded *"with instructions to enter judgment upon the second count of the indictment"* and for such proceedings

as to the first count as may be in conformity with law (p. 203).

The substance of Section 24 of the Judiciary Act of 1789 and of Section 2 of the Act of June 1, 1872, was embodied in Section 701 of the Revised Statutes (which is the form in which they were in force when *Ballew* v. *United States* was decided), and that Section still remains in force and is as follows:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, OR may direct such judgment, decree, or order to be rendered, OR such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

And that statute is made applicable to the Circuit Courts of Appeal by Section 11 of the Act of March 3, 1891, 26 Stat. 829 (*Ballew* v. *United States, supra,* at pp. 201, 202; *Realty Co.* v. *Montgomery,* 284 U. S. 547, 550).

Nothing pertinent to the case at bar was actually decided in *Realty Co.* v. *Montgomery,* 284 U. S. 547, but it is pertinent to observe that the court there said that the statute "warrants *the giving of directions* by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in

*Section 701 *purports* to be now embodied in U. S. Code, Title 28, sec. 876, but it is there incorrectly transcribed. As there transcribed, the words "circuit court, or district court acting as a circuit court, or of a" which immediately precede the words "district court in prize causes," are omitted, so that it would seem to be limited to judgments, decrees and orders "of a district court in prize causes." The Code is only *prima facie* the law, and the original enactment, not the Code, controls (Act of June 30, 1926, 44 Stat. pt. 1). The section is quoted in its correct form in *Realty Co.* v. *Montgomery,* 284 U. S. 547, 550 (1931).

consequence of such action, such proceedings should be had." (p. 551.)*

In *Cragin* v. *Lovell*, 109 U. S. 194, in which the reversal was put upon the ground that the declaration did not state a cause of action, the court said (pp. 199, 200):

> "This court, on reversing a judgment of the circuit court, *may order such judgment for either party as the justice of the case may require.* Rev. Stat. § 701; *Insurance Cos.* v. *Boykin*, 12 Wall. 433. In the case at bar, the order, following the precedent of *Slacum* v. *Pomery*, 6 Cranch. 221, will be that the judgment below be reversed, and the case remanded with directions that judgment be arrested."

Whether or not the court is inclined to limit or reconsider the *Slocum case* has become an interesting topic among the profession since *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654,** and we take the liberty of making the observation that it seems to us that the history of the Act of 1789 and what has been said and decided in the cases to which we have called attention would have a very material bearing in that connection. As judgment may be arrested, after and notwithstanding a verdict, because the declaration does not allege facts sufficient to constitute a cause of action, it would seem to us that a like course is permissible where the evidence does not establish facts sufficient to constitute a cause of action. It seems to us that it is law only, and not a re-examination of the facts, which is involved in each instance.

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*See, also, *Camp* v. *Gress*, 250 U. S. 308, where it was said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to *enter such judgment* or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States*, 160 U. S. 187, 198, et seq."

**Compare *Preliminary Draft of Rules of Civil Procedure*, prepared by the Advisory Committee, Foreword XII and Rule 56 and notes.

But however that may be, it is demonstrably clear, we submit, that the cases cited certainly prevent an extension of the *Slocum case* to such a situation as is here presented.

The verdict here was not set aside, as was the situation in the *Slocum case*. The Circuit Court of Appeals has not attempted any re-examination of any fact tried by a jury. The verdict here is allowed to stand as a final determination of the facts and is made the basis of the final decision. The error which the Circuit Court of Appeals has found in the record is in what happened after the verdict—in the kind of judgment or sentence which was pronounced upon that verdict—and what it has done is to direct the proper judgment upon that verdict. *Insurance Companies* v. *Boykin* certainly establishes that that may be done under the statute and also that that is "the rule by which courts of error were governed at the common law." See, also, *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498, 499.

The verdict here, in reality and substance, if not in form, was a *special verdict* or at least a general verdict with special findings added; and it may be treated as such just as the verdict in *Insurance Company* v. *Piaggio, supra,* was in substance so treated. It found the fact of fraudulent claim because it found that the property destroyed was worth only $17,000, and the settled rule is that special findings control the general (*Davis* v. *Ætna Acceptance Co.*, 293 U. S. 328, 332; *Walker* v. *Southern Pacific R. R.*, 165 U. S. 593, 597, 598; *Victor-American Fuel Co.* v. *Peccarich,* 209 Fed. 568, 571, which is cited in *Davis* v. *Ætna Acceptance Co., supra; Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, 234).

The constant practice is for the appellate court to render final judgment upon reversal where special findings have been made by the court (*Fort Scott* v. *Hickman,* 112 U. S. 150, 164, 165), and, as already noted, the same thing

has been done where special findings have been made by a jury (*Hooe* v. *Groverman,* 1 Cranch. 214; *Fitzsimmons* v. *Newport Ins. Co.,* 4 Cranch. 185; *Otis* v. *Watter,* 11 Wheat. 192; *Comegys* v. *Vasse,* 1 Pet. 193; *Bank of Alexandria* v. *Swann,* 9 Pet. 33; *McCool* v. *Smith,* 1 Black 459, cited at p. 51, *supra*). No "reexamination of the facts" is involved whether the findings be made by the court or by the jury. Indeed, special findings by the court have been specifically declared to be equivalent to a special verdict of a jury (*Fort Scott* v. *Hickman, supra; Davis* v. *Ætna Acceptance Co., supra*), and it has been specifically held by this court that *the granting of judgment upon special findings by a jury which are inconsistent with its general verdict is not an infraction of the Seventh Amendment* (*Walker* v. *Southern Pacific R. R.,* 165 U. S. 593). In that case the jury returned a general verdict for the plaintiff and at the same time made special findings which were inconsistent with its general verdict, and the trial court thereupon entered judgment *for the defendant,* and its action was affirmed despite a contention that its action violated the Seventh Amendment.

All that the Circuit Court of Appeals has done in the case at bar is to direct the judgment which legally and properly follows from the jury's special finding that the damages were only $17,000. Whether that direction be couched in the phrase "Enter an order in arrest of judgment", as in *Cragin* v. *Lovell,* or in the phrase "Enter judgment for defendant", which would coincide with the direction in *Insurance Co.* v. *Piaggio,* is a mere matter of words. The result is the same whichever form of expression be used, and both phrases have the sanction of prior decisions of this court.

Having heretofore adverted to *Pangburn* v. *Buick Motor Co.,* 211 N. Y. 288, as a case in which a verdict in

form for the plaintiff was regarded as being in substance and reality a verdict for the defendant, we desire to call attention to the fact that, while the New York Court of Appeals there granted a new trial in the exercise of its discretion, it nevertheless distinctly asserted that it had the power, under a statute substantially identical with U. S. Rev. Stat. § 701, to render final judgment dismissing the complaint (p. 236), although New York's Constitution also guarantees trial by jury (Art. I, sec. 2).

The right of the Circuit Court of Appeals to direct the entry of the judgment which it deems proper is also asserted in *Douglas* v. *Edwards,* 298 Fed. 229, 245; *Larocque* v. *Dorsey,* 299 Fed. 556, 559; *American Lumber & Mfg. Co.* v. *Equitable Life Assurance Society,* 45 Fed. 2d 504, 506, each of which was decided after the *Slocum case.*

POINT V.

Reversible error was committed in refusing requested instructions to the jury.

1. Respondent asked the court to instruct the jury that there was no evidence from which the *cost of labor,* claimed in the complaint and proof of claim in the sum of $2,524.50 could be determined and that as to so much of the claim they should find for respondent (R. 21, 308). With respect to that request the court said (R. 308):

> "Now I charge you that, with this modification: unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence—*I do not recall it,* but *if you find it from the record* then you can find only for such amount as the plaintiff actually paid for labor."

The so-called modification was actually a *refusal* of the request, for although the court stated that it could not recall any evidence by which the cost of labor could be determined, it nevertheless left it to the jury to say whether there was or not. Indeed, the so-called modification was worse than an outright refusal, for it in effect conveyed to the minds of the jury that there probably was some evidence from which the cost of labor could be determined, even though the court knew of none and opposing counsel pointed out none.

The rule is well established that, where there is no evidence to sustain one of several charges or counts of negligence, that charge or count must be withdrawn from the consideration of the jury by an instruction to that effect, and that a refusal to withdraw it constitutes error requiring that an adverse verdict be set aside (*Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60, 77-79; *Chicago, St. Paul, M. & O. Ry. Co.* v. *Kroloff*, 217 Fed. 525, 528, 8 C. C. A.; *Erie R. Co.* v. *Gallagher*, 255 Fed. 814, 817, 2 C. C. A.; *Buckeye Cotton Oil Co.* v. *Sloan*, 250 Fed. 712, 722, 6 C. C. A., per Mr. Justice SANFORD, as District Judge); and of course the same rule is applicable to particular items of any claim, whether constituting separate counts in a pleading or not. "Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested" (*Greenleaf* v. *Birth*, 9 Pet. 292, 299).

Whether or not there is any evidence to support a particular item or charge or count is a question of law for the court; and when a request is made to withdraw a particular item or charge or count from the consideration of the jury upon the ground that there is no evidence to sustain it, the court is called upon to decide that question. If the court itself can recall no such evidence, the obvious course is to call upon opposing counsel to point it out if it exist;

and if the court recall none and opposing counsel point out none, then the requested instructions should be given. For a court merely to say that, although it recalls no such evidence, yet the jury may possibly find it somewhere in the record, is to fail to perform the functions which the law assigns to the judge.

The dissenting judge in the Circuit Court of Appeals, both in his dissenting opinion upon the reargument (R. 338, 339) and in the opinion which he wrote for the court upon the first hearing (R. 318), referred to the testimony of the accountant Gorbea, but, as already pointed out at pages 32, 33, *supra,* the accountant's testimony, and the books to which he referred, related to *goods in process* and not to *cost of labor on goods in process*—a distinction which the dissenting judge failed to note and which led him into considerable confusion (See further upon this point the petition for rehearing at R. 330, 331).

In the prevailing opinion of the Circuit Court of Appeals upon the reargument it is distinctly and correctly stated that there is no evidence in the case to sustain this item and that counsel for petitioner has pointed out none, though requested to do so (R. 336). It consequently follows that the failure to charge as requested constitutes reversible error.

2. Respondent also asked the court to instruct the jury that there was no evidence from which it could determine the *market value of merchandise sold to petitioner by its president* and that petitioner consequently could not recover for the loss of such merchandise (Request 9, at R. 22); and it excepted to the court's refusal to give that instruction (R. 310).

Rivera Soler, petitioner's president, had testified that when petitioner was organized he had sold it certain machines, but he did not say what the purchase price was

and also said that he was unable to say how much he had paid for them (R. 105, *supra*, p. 16). He also had testified that in July, 1931, he had sold machines to petitioner for $7,500 but did not know where he had gotten them or what he had paid for them (R. 115, *supra*, pp. 17, 18). He also had testified that he had sold thread to petitioner at a price which was higher than he had paid for it and was unable to say what he had paid for it (R. 111, *supra*, p. 20).

We thus have the situation of a corporate officer, charged with the duty of running the corporation's business, purchasing goods which the corporation needs in its business and turning over the goods to the corporation at a profit to himself. If nothing more were involved than the fraud thus committed by the officer upon his own corporation, perhaps respondent could not complain. What respondent complains of is the utter absence of any evidence as to the value of the goods. The burden obviously was upon petitioner to prove value, and as that evidence was not given it was reversible error to refuse the requested instruction (See cases cited at p. 62, *supra*).

Conclusion.

1. Upon the ground stated in the prevailing opinion of the Circuit Court of Appeals upon the reargument, *viz.*, that the jury's verdict finds fraud and hence establishes the fact which entitles respondent to judgment, the judgment of that court should be affirmed (Points III and IV at pp. 34-61, *supra*).

2. Upon the ground that the evidence is not legally sufficient to sustain any verdict for petitioner (Points I and II at pp. 22-34, *supra*), the judgment of the Circuit Court of Appeals likewise should be affirmed, unless this court be of the opinion that the *Slocum case* requires that

upon a reversal upon that ground there still must be the formality of a new trial; and in that event the judgment of the Circuit Court of Appeals should be modified so as to direct that the case be remanded to the District Court with instructions that upon a new trial a verdict should be directed for respondent.

3. If this court should be of the opinion that misdirection to the jury is the only error in the record (Point V at pp. 61-64, *supra*), the judgment of the Circuit Court of Appeals should be modified so as to direct that the judgment of the District Court be reversed and a new trial awarded.

Respectfully submitted,

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October 1936.

CPY2398

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1936.

Jose Rivera Soler & Co., Inc., Petitioner,
vs.
The United Firemen's Insurance Company of Philadelphia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 9, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, the Insurance Company, issued to petitioner a $30,000.00 fire policy covering certain personalty in Puerto Rico, distributed thus: $15,000.00 On stock of merchandise, unembroidered, embroidered and in the process of being embroidered, or for repairs, and on cost of labor performed thereon, including, etc.; $12,000.00 On machinery of every description, etc.; $3,000.00 On furniture, fixtures, etc.

After a fire petitioner presented sworn proof of loss exceeding $35,000.00 and demanded payment of the full amount of the policy. This was refused. It then brought this action in the District Court of the United States for Puerto Rico to recover the sum demanded with interest. Claiming that the assured had acted fraudulently and had failed to comply with specified conditions, the Company denied any liability. There was a verdict for $17,000.00 plus interest; an appropriate judgment followed. A bill of exceptions also ten assignments of error were filed, and the cause went to the Circuit Court of Appeals, First Circuit.

That court, having heard the matter, affirmed the challenged judgment—May 25, 1935. The supporting opinion of that date states, "The defenses now relied upon rest upon breaches of what are commonly referred to as 'conditions subsequent', the real defense being that the plaintiff's claim was essentially fraudulent. The provisions of the policy relied on in defense are the so-called 'Iron Safe' clause and condition 12."

The "Iron Safe" clause requires the assured to keep "a complete itemized inventory of stock on hand", and "a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments"; also that these shall be "securely locked in a fireproof safe at night" etc.

Condition 12 provides: "If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; . . . all benefit under this policy shall be forfeited."

The first seven assignments, relating to the failure of the trial judge to direct a verdict, also numbers eight and nine, were overruled.

The eighth assignment assailed the refusal to instruct that no evidence tended to support the $2,524.50 item for cost of labor found in the proof of loss; the ninth challenged the failure to instruct that there was nothing from which the jury could determine the market value of certain merchandise said to have been sold to the assured by its president.

Concerning the tenth assignment the Court said, "The value of the destroyed property as claimed by the plaintiff was about $34,000.00. The jury's verdict was for $17,000.00. The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent over-valuation by the plaintiff in the proof of loss. Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it."

A rehearing was granted. A second judgment followed (January 7, 1936) which vacated the earlier one and remanded the cause to the trial court "with directions to enter an order in arrest of judgment, with costs to the appellant in both courts." An opinion, from which the judge who wrote the original one dissented, pointed out the reasons for the action taken. This considered only the tenth assignment of error and the one based upon failure to direct a verdict because no evidence tended to support the $2,524.50 item for "Labor on goods in process." Assignments based upon alleged violations of the "Iron Safe" clause were not discussed.

The court said, "Under the 10th assignment it is contended that the verdict and judgment are contrary to law, that the amount of the loss fixed by the verdict is so inconsistent with the proof

of loss and the provisions of the policy, both of which are made a part of the pleadings, as to show that the plaintiff's sworn proof of loss was fraudulent as a matter of law." "Bills of exception are necessary to preserve exceptions to rulings made in the progress of the trial, but errors appearing on the face of the record proper need not be so preserved. In the court below the defendant could have made a motion in arrest of judgment, but no such motion was necessary." "In considering the question raised by the 10th assignment the evidence introduced at the trial and brought here by bill of exceptions is not to be considered, for that is no part of the record proper. The inquiry is confined to such matters as appear in the record proper. That record in this case includes the complaint, proof of loss and the policy (which are included in the complaint), the verdict and judgment." "It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000.00 shows on its face and as a matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000.00."

Also: "Under the motion for a directed verdict the evidence introduced at the trial and included in the bill of exceptions is open for consideration. There is no evidence in the case and counsel for the plaintiff has pointed out none, though requested to do so, showing that the cost of labor 'on goods in process' was $2,524.50, as stated in the sworn proof of loss. The only evidence in the record relating to that subject is that given by Soler himself (president of the plaintiff company) where he states that the sum of $2,524.50 was the contract price which the company was to receive for manufacturing the goods of others. If the statement in the proof of loss, to which Soler made oath, did not represent the cost of labor, but was the contract price which the plaintiff was to receive from others for whom goods were being manufactured, no other conclusion can reasonably be drawn than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that the plaintiff was not entitled to and was fraudulent. And, under Condition 12 of the policy, deprived the plaintiff of its benefits. Soler was the president of the plaintiff company and made oath to the proof of loss."

The second opinion holds in effect that fraud by the plaintiff conclusively appears on the face of the record without giving consideration to any evidence; also that fraud on its part with respect to the item "Labor on goods in process" included in the proof of loss so clearly appeared from the evidence that the defendant was entitled to a directed verdict.

We cannot accept the view that a conclusive presumption of fraud arose because the verdict was far less than the amount stated in the proof of loss. If the bill of exceptions be disregarded we must assume the jury was properly instructed—were told that condition 12 required a verdict for the insurer "if the claim be in any respect fraudulent." The finding for the assured indicates that they discovered no fraud. Policy holders may present inaccurate proofs of loss without conscious dishonesty or intent to defraud; different views of values are common; memory is faulty; insurance company and assured often entertain widely different views concerning the policy; and evidence cannot always be produced to establish something declared to be true in entire good faith.

For like reasons we cannot say the trial judge, even if he thought there was complete failure to sustain the item for "Labor on goods in process", should have ruled that this alone was enough to show fraud and required a directed verdict for the Company. Condition number 12 was read to the jury and declared to be "legal and part of the conditions of the contract." He also charged clearly enough that any dishonest claim made with intent to defraud would render the policy inoperative. Nevertheless the jury found for the assured. In these circumstances we cannot say there was a conclusive presumption of purpose to defraud.

Although the court below, in its first opinion, clearly overruled assignments based upon the "Iron Safe" clause and said nothing about them in the second, counsel insist that they are before us and adequate to support the questioned judgment. If, in the circumstances they can be considered at all, it is enough to say that the jury was well instructed concerning the necessity of complying with that clause; the verdict negatives the notion of fraud. There was conflicting evidence; the weight to be given this was for them to determine.

The judgment of the Circuit Court of Appeals must be reversed. We find no material error in the action of the District Court, and its judgment is affirmed.